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JULY—DECEMBER, 1942.

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II] JUNE [1942

IN THE FEDERAL COURT.

[*Appellate Jurisdiction*].

(On Appeal from the High Court of Judicature at Lahore).

PRESENT:—SIR MAURICE GWYER, *Chief Justice*, SIR S. VARADACHARIAR AND ZAFRULLA KHAN, JJ.

Administrator, Lahore Municipality .. *Appellant**

v.

Daulat Ram Kapur .. *Respondent.*

F.C.

Administrator, Lahore Municipality *v.* Daulat Ram Kapur.

Government of India Act, 1935—List I, Entries Nos. 44, 45 and 47—Taxes on salt—Exclusive jurisdiction of Central Legislature—Octroi duty on salt levied by Municipality under powers conferred by Provincial Legislature—Validity—Provincial legislation incidentally affecting Central subject—Legality—The Punjab Municipal Act, 1911, Ss. 18, 61 (2) and 238 (2)—Superseded Municipality—Commencement of proceedings—Administrator alone competent.

It cannot be said that the powers of the Central Legislature to impose duties or taxes on salt should be limited to these derivable under entries Nos. 44 and 45 of List I of the Government of India Act, 1935. The mention of salt in entry No. 47 of List I places it in the exclusive jurisdiction of the Central Legislature, and therefore it is not possible to put any limitation upon the extent of exclusion of provincial interference, so far as this item is concerned. Consequently, the imposition of an octroi duty on salt by the municipal administration of Lahore, which under S. 61 (2) of the Punjab Municipal Act is empowered with the previous sanction of the Provincial Government to impose any tax which a Provincial Legislature has power to impose in the Province, is illegal.

It may be a question whether notwithstanding the generality of entry No. 47 in List I, a Provincial Legislature may not enact legislation which only incidentally affects salt. When taxes are imposed specifically upon a number of items, only some of which are within the jurisdiction of the Legislature which imposes them, the validity of each impost can be dealt with by itself and there is no question of the one affecting the other. The situation is not parallel to one in which legislation whose main object or pith and substance is legitimate is sought to be invalidated merely on the ground that it incidentally affects something outside the sphere permitted to the Legislature which has enacted it.

The provisions of S. 18 of the Punjab Municipal Act relating to the corporate character of the Municipal Committee and the manner of suing

*Case No. 11 of 1941. 4th March, 1942.

must be read subject to the provisions of S. 238 (2) of the said Act which lays down the consequences of a supersession. It may be that a supersession has not the effect of a dissolution and that when another committee is constituted in the place of the superseded committee, it is a revival of the old Corporation and not the creation of a new one. But during the period when the order of supersession is in force, the statute makes it clear that all the members of the committee vacate their seats and that all the powers and duties of the committee are to be exercised and performed by the Administrator. Under those circumstances the person competent to take proceedings is the Administrator and not the dormant Corporation.

Mahamahopadyaya Rangachariar v. *The Municipal Council of Kumbakonam*, (1906) 16 M.L.J. 582: I.L.R. 29 Mad. 539, referred to.

M. Sleem, Advocate-General of the Punjab (*Kanwal Kishore Raizada* with him), instructed by *B. Banerji*, Agent, for Appellant.

Rai Bahadur Harish Chandra (*Radha Mohan Lal* with him), instructed by *Ganpat Rai*, Agent, for Respondent.

The Judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This appeal arises out of proceedings taken by the respondent to challenge the validity of the imposition of an octroi duty on salt by the municipal administration of Lahore. Under S. 61 (2) of the Punjab Municipal Act, 1911, the municipal administration is empowered, with the previous sanction of the Provincial Government, to impose any "tax which a provincial Legislature has power to impose in the Province under the Government of India Act, 1935". In April, 1938, the appellant who, under S. 238 of the Municipal Act, had been exercising the powers of the superseded Municipality of Lahore, published a notification imposing octroi duties at varying rates on goods imported into Lahore, and salt was one of the commodities specified in the schedule under the heading "articles of food and drink". In October, 1939, the respondent brought two maunds of salt into the municipal limits and, with the evident object of making it a test case, he paid the duty under protest and later applied for refund of the amount. When the matter was taken on appeal to the Deputy Commissioner, under S. 84 of the Punjab Municipal Act, he referred to the High Court the question whether the notification above referred to was authorized by law so far as it related to the impost on salt. The learned Judge who heard the reference held that in imposing a tax on salt the appellant had transgressed the limits of his authority under the law. The appellant now appeals to this Court.

On behalf of the respondent, a preliminary objection was taken to the form of the appeal. It was contended that only a party to the proceedings in the Court below could appeal to this Court and that the Municipal Committee, and not the Administrator, was the party in the High Court. It was also urged that as the Municipal Committee had been constituted by S. 18 of the Municipal Act a body corporate with perpetual succession, its supersession did not put an end to the corporation and that all legal proceedings by or against the corporation must, as provided in that section, be instituted only in the name of the corporation. These objections seem to us devoid of substance. The proceedings

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before the Deputy Commissioner and the reference by him to the High Court were not framed on the lines of formal pleadings; but taking them as a whole it would appear that it was the Administrator who was treated therein as the opposite party, though in the title of the judgment of the High Court the "Municipal Committee, Lahore" is described as the respondent. The provisions of S. 18 of the Punjab Municipal Act relating to the corporate character of the Committee and the manner of suing must be read subject to the provisions of S. 238 (2) which lays down the consequences of a supersession. It may be (as held in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam*[1]) that a supersession has not the effects of a dissolution and that when another Committee is constituted in the place of the superseded Committee, it is a revival of the old corporation and not the creation of a new one. But during the period when the order of supersession is in force, the statute makes it clear that all the members of the Committee vacate their seats and that all the powers and duties of the Committee are to be exercised and performed by the Administrator. It sems to us that we should be carrying the legal fiction to a needless length if we insisted that even in this state of facts, proceedings must be taken only in the name of the dormant corporation. It has not been disputed that the person competent to take proceedings is the Administrator; and even if the true view should be that he should take proceedings in the name of the Committee, the defect is one purely of a formal character which can be cured by amendment.

The decision of the question of law arising in the case turns on the combined effect of entry No. 47 of List I and entry No. 49 of List II of the Seventh Schedule to the Constitution Act. Under the latter, a provincial Legislature is entitled to levy "cesses on the entry of goods into a local area for consumption, use or sale therein"; and the appellant claims that the octroi duty in question falls within this description. The respondent contends that this entry must be interpreted in the light of entry No. 47 in List I, which makes salt a subject within the exclusive control of the Federal Legislature. One way of putting the respondent's argument is to say that, reading the two Lists together, the general description "goods" in entry No. 49 of List II must be understood as referring to goods *other than salt*. It is also contended that under S. 100 (1) of the Constitution Act, the provincial Legislature has expressly been denied the power to make laws with respect to salt since "salt" is one of the matters enumerated in List I. Both these contentions were upheld by the learned Judge who dealt with the case in the High Court and he was also of the opinion that S. 140 (1) of the Constitution Act lent some support to this view.

In support of this appeal, it has been contended by the Advocate-General of the Punjab that the learned Judge erred in treating entry No. 47 in List I as the source of the Central Legislature's authority to impose any duty or tax on salt, and that he also erred in relying upon S. 140 as though it were a charging section. By a reference to various entries in Lists I and II counsel

1. (1906) 16 M.L.J. 582: I.L.R. 29 Mad: 539.

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atempted to show that, whenever a power to tax was intended to be conferred, it was expressly given; and he urged that a general mention of a subject as in entry No. 47 was only meant to give a general power of control and had no relation to powers of taxation. He invited attention in this connection to entries No. 19, 26, 28 ad 33 of List I and compared them with entries No. 44, 58, 57 and 46. He likewise compared entries No. 21 and 36 of List II with entries No. 43 and 50 in the same List, and entry No. 52 of List II with entry No. 32 of List III. On this footing, he argued that so far as the levy of tax or duty on salt was concerned, the subject must be deemed to be provided for only in entries No. 44 and 45 of List I and that as the impost now in question was not in the nature of a customs duty or excise duty, there was no reason for restricting the scope of the general language used in entry No. 49 of List II or for bringing into operation the prohibition enacted in sub-S. (1) of S. 100 of the Constitution Act.

An examination of the entries in the three Lists lends some support to counsel's contention as to the lines on which the Lists have been framed. But we are not prepared, nor do we think it necessary for the purpose of this case, to accept that contention in its generality. We hesitate at any rate to say that the powers of the Central Legislature to impose duties or taxes on salt must be limited to those derivable under entries No. 44 and 45 of List I. It is true that S. 140 of the Constitution Act is not a charging section and that it occurs in a chapter dealing with the distribution of revenues between the Federation and the federal units. But the express mention in that section of "duties on salt" separately from "federal duties of excise" and "export duties" rather suggests that duties on salt were not contemplated as falling under entries No. 44 and 45 of List I. Counsel suggested that the separate reference to duties on salt might have been made with a view to include *import* duties thereon under the heads of revenue divisible among the federal units. This is a possible explanation; but it is nevertheless difficult to get rid of the impression that duties on salt were regarded as a category by themselves not comprised under the headings of excise or customs duties. Such separate treatment would indeed seem to be justified by the fact that, unlike other goods which may form the subject of excise or customs duties, salt is in a sense a state monopoly in this country and its manufacture, transport and sale are subject to state control. It was for this reason clearly that entry No. 47 of List I included salt in the exclusive jurisdiction of the Central Legislature.

Assuming however for the sake of argument that the Central Government's power to levy any impost on salt must be derived only from entries No. 44 and 45 of List I and that entry No. 47 was not intended to include the power of levying taxes or duties, the objection based upon S. 100 (1) of the Constitution Act would nevertheless remain, so long as salt is an entry specifically included in the exclusive Federal List. The appellant's counsel would read entry No. 47 as though it said, in terms, "salt, except taxation". We do not think that this is legitimate or permissible.

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It is one thing to say that the entry does not authorize taxation, but it is a different thing to say that taxation is *excluded,* as that will make a material difference in the operation of sub-S. (1) of S. 100. If taxation is specifically excluded from entry No. 47 in List I, the effect will be to take away *pro tanto* the prohibition against provincial legislation imposed by S. 100 (1). It is, on the other hand, quite conceivable that even without the power of taxation, Parliament should have desired that the Central Government and the Central Legislature should retain exclusive control over salt and to prohibit any kind of interference with it by provincial Legislatures. It is, for instance, common knowledge that public opinion in this country has always insisted that salt should be made available to the people at the lowest possible price; but the recognition of a power in the provincial Legislature to impose duties on salt, whether for the benefit of provincial revenues or for the benefit of local authorities, might materially affect the policy of the Central Government in this respect.

It is noteworthy that in respect of opium and petroleum, the exclusive jurisdiction of the Centre is limited by the words "so far as regards cultivation and manufacture or sale for export" in entry No. 31 and the words "so far as regards possession, storage and transport" in entry No. 32. Such a limitation justifies the view (confirmed by entry No. 40 of List II) that the provincial Legislatures are not wholly deprived of jurisdiction with reference to these goods. But the reference to salt in entry No. 47 is unqualified; and therefore it is not possible to put any limitation upon the extent of exclusion of provincial interference, so far as this item is concerned. A comparison of entry No. 2 in List I with entry No. 10 of the same List is instructive in this connection, as showing an instance of the total exclusion of provincial jurisdiction in respect of naval, military and air force works while recognising the possibility of provincial legislation even in respect of works, lands and buildings belonging to the Federation if and so far as they are not naval, military or air force works. In the view above stated, it is unnecessary to discuss the distinction sought to be drawn between cesses and taxes, because, if the provincial Legislature is wholly precluded from dealing with salt, it is immaterial whether the proposed impost is one by way of tax or one by way of cess.

It may be a question whether, notwithstanding the generality of entry No. 47 in List I, a provincial Legislature may not enact legislation which only incidentally affects salt (see *Gallagher* v. *Lynn*[1], and *see also* observations in *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia*[2]. But that question does not arise in the present case. When taxes are imposed specifically upon a number of items, only some of which are within the jurisdiction of the Legislature which imposes them, the validity of each impost can be dealt with by itself and there is no question of the one affecting the other. The situation is not parallel to one in

1. (1937) A.C. 863.
2. (1898) A.C. 700, at p. 716.

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which legislation whose main object or pith and substance is legitimate is sought to be invalidated merely on the ground that it incidentally affect's something outside the sphere permitted to the Legislature which has enacted it.

The appeal fails and is dismissed with costs.

B.V.V. ——— *Appeal dismissed.*

IN THE FEDERAL COURT.

[*Appellate Jurisdiction*]

(On appeal from the High Court of Judicature at Patna.

PRESENT:—SIR MAURICE GWYER, *Chief Justice*, SIR S. VARADACHARIAR AND ZAFRULLA KHAN, JJ.

Bhola Prasad .. *Appellant**

v.

The King-Emperor .. *Respondent.*

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Government of India Act, 1935—*Ss.* 108, 297 (1), *List II, Entry No.* 31—*Regulating sale of intoxicating liquor—Power of Provincial Legislature—Bihar Excise Amendment Act of* 1940—*Provisions of S.* 19 (4) *of Bihar and Orissa Excise Act* 1915 *modified—Amending Act whether* ultra vires—*Previous sanction of Governor-General, if necessary.*

The Bihar Excise (Amendment) Act of 1940, which has amended S. 19 (4) of the Bihar and Orissa Excise Act of 1915 is not *ultra vires* of the Provincial Legislature or *ultra vires* the Governor of Bihar, exercising the powers of the Provincial Legislature by virtue of a Proclamation under S. 93 of the Constitution Act. The Entry in No. 31 of List II, is very widely worded and it confers the power on the Provinces to prohibit intoxicating liquors throughout the Province or any specified part of a Province.

The Bihar Excise (Amendment) Act, 1940, is not invalid as being repugnant to S. 297 (1) (*a*) of the Government of India Act.

The Governor-General's Act to which S. 108 of the Government of India Act refers, means and can only mean, an Act such as the Governor-General is empowered to enact under S. 44 of the Government of India Act. It cannot be contended that as the Bihar and Orissa Excise Act of 1915 received the assent of the Governor-General therefore the introduction of any Bill amending it required the previous sanction of the Governor-General.

S. C. Chakravarty (*Kanwal Kishore Raizada* with him), instructed by *B. Banerji*, Agent, for Appellant.

Baldev Sahay, Advocate-General of Bihar, (*P. P. Varma* with him), instructed by *T. K. Prasad*, for Respondent.

Sir Alladi Krishnaswami Aiyar, Advocate-General of Madras (*Rajagopala Aiyangar* with him), instructed by *Ganpat Rai*, Agent, Intervener.

The Judgment of the Court was delivered by

Gwyer, C. J.

Gwyer, C.J.—In this case the appellant appeals against an order of the High Court at Patna setting aside an acquittal in a Magistrate's Court and convicting the appellant of an offence under S. 47 (*a*) of the Bihar and Orissa Excise Act, 1915, and a Government Notification, dated 18th November, 1940, issued under

*Case No. 8 of 1941. 4th March, 1942.

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the powers conferred by S. 19 (4) of that Act. To understand the issues involved in the appeal, it is necessary to give some account of the history of the legislation under which the appellant was charged and has now been convicted.

The Bihar and Orissa Excise Act, 1915 (Act No. II of 1915), was a consolidating and amending Act, replacing in Bihar and Orissa an earlier Bengal consolidating and amending Act, the Bengal Excise Act, 1909. S. 19 of the Act of 1915, prohibits unlicenced persons (with certain exceptions) from having in their possession, without a permit granted by the Collector, any excisable article in excess of such quantity as the Board of Revenue may, under the powers given to it by the Act, have declared to be the limit of a retail sale. Licensed vendors are similarly prohibited from having in their possession at any place other than that authorized by their licence any quantity of excisable liquor in excess of the same amount. Sub-S. (4) of the section then provides as follows:

"(4) Notwithstanding anything contained in the foregoing sub-sections, the Local Government may, by notification, prohibit the possession by any person or class of persons, either in the Province of Bihar and Orissa or in any specified local area, of any excisable article either absolutely or subject to such conditions as it may prescribe".

By S. 47 of the Act, any person who, in contravention of the Act, or of any notification made under it, "imports, exports, transports, manufactures, possesses or sells any excisable article" is liable to be imprisoned or to be fined, or to be both imprisoned and fined.

By a Notification, dated 26th March, 1939, and made under the sub-section quoted above, the Local Government purported to prohibit the possession of country liquor and of certain drugs in the areas specified in the Notification. One Kanhai Sahu was prosecuted and convicted under this Notification on a charge of illegal possession of country liquor in a prohibited area; but the High Court at Patna on appeal set aside the conviction on the ground that the Provincial Government had no power, as the law then stood, to make a notification prohibiting the public generally within the Province or any part thereof from possessing intoxicating liquor: *Kanhai Sahu* v. *King-Emperor*[1]. The main ground of the decision was that on the true construction of the sub-section the Local Government only had power to impose prohibition on specified persons or classes of persons, and that the words "any person or class of persons" could not be interpreted as meaning "all persons or any class of persons". The High Court also laid stress on the fact that, as it appeared to them, the Act of 1915 was an Excise Act, designed mainly for the benefit of the provincial fisc, and that it did not appear from the preamble to the Act or its provisions generally that the Legislature had intended that the Act should be used for the purpose of introducing the policy of what is commonly known as Prohibition.

1. (1940) I.L.R. 20 Pat. 181.

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As a consequence of this decision of the High Court, the Governor of Bihar, in the exercise of the legislative powers which he had assumed by his Proclamation of 3rd November, 1939, under S. 93 of the Constitution Act, enacted a Governor's Act entitled the Bihar Excise (Amendment) Act, 1940. By S. 2 of this Act a paragraph was inserted in the preamble to the original Act of 1915 to the following effect:

"Whereas in order to promote, enforce and carry into effect the policy of prohibition, it is necessary to prohibit the import, export, transport, manufacture, sale and possession of liquor and of intoxicating drugs in the Province of Bihar or any specified areas thereof".

Then by S. 3 of the Act, it was provided that S. 19 (4) of the Act of 1915 should be so amended as to prohibit the possession of intoxicating liquor

"by any person or class of persons *or, subject to such exceptions, if any, as may be specified in the Notification, by all persons* either in the Province of Bihar or in any specified local area".

The words in italics are those added by the amending Act to the sub-section. The amending Act was followed by a fresh Notification, dated 18th November, 1940, in the same terms as the Notification which had been held by the High Court to be invalid, and it was on a charge under this Notification that the Magistrate's order of acquittal was subsequently reversed by the High Court, who held that in view of the amending Act the appellant had no defence in law.

Counsel for the appellant first contended that the amending Act of 1940 was in any case *ultra vires* the Provincial Legislature, and therefore equally *ultra vires*, the Governor of Bihar, exercising the powers of the Legislature by virtue of a proclamation under S. 93 of the Constitution Act. He contended also that the Act was invalid because it contravened the provisions of paragraph (*a*) of S. 297 (1) of the Constitution Act. His third contention was that the Act of 1915 was a Governor-General's Act within the meaning of paragraph (*b*) of S. 108 (2) of the Constitution Act and that therefore the Act of 1940, which amended it ought to have had the previous sanction of the Governor-General under that sub-section, the omission not having been made good by the subsequent assent of the Governor-General to the Act, to which the Governor had alone assented: *see* S. 109 of the Constitution Act. It will be convenient to deal with each of these contentions separately and in the same order.

In support of his first contention, counsel boldly argued that S. 100 (3) of the Constitution Act, which gives a Provincial Legislature power to make laws for a Province or any part thereof "with respect to" any of the matters enumerated in the Provincial Legislative List, has not given power to introduce either total or partial prohibition in the Province by reason only that among the matters in the List with respect to which a Provincial Legislature is empowered to legislate are those set out in entry No. 31:

"intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs".

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A power to legislate "with respect to intoxicating liquors" could not well be expressed in wider terms, and would, in our opinion, unless the meaning of the words used is restricted or controlled by the context or by other provisions in the Act, undoubtedly include the power to prohibit intoxicating liquors throughout the Province or in any specified part of the Province. This Court has already held in *The United Provinces* v. *Atiqa Begum*[1], that the power to legislate with respect to the collection of rents (List II, entry No. 21), includes the power to legislate with respect to the remission of rents as well as their collection and there is a dictum in one of the judgments in that case that the power to legislate with respect to "fisheries" (List II, entry No. 24), would include the prohibition of fishing altogether in particular places or at particular times. But, it is said, the context does in fact require a more restricted meaning to be given to the general words at the beginning of entry No. 31, inasmuch as "intoxicating liquors and narcotic drugs" is followed by the words

"that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs".

In our opinion these words are explanatory or illustrative words, and not words either of amplification or limitation. It is difficult to conceive of legislation with respect to intoxicating liquors and narcotic drugs which did not deal in some way or other with their production, manufacture, possession, transport, purchase or sale; and these words seem apt to cover the whole field of possible legislation on the subject. We were however referred to three English authorities which, it was alleged, justified a different conclusion. These authorities do not seem to us to be relevant, for they were concerned with the meaning and effect of a statutory power to "regulate"; and it was held in all three cases that a power to regulate does not include a power to prohibit. The first case was *Dick* v. *Badart*[2]. In that case a dock company, who were undertakers under a special Act, had made by-laws prohibiting workmen of a specified class from working on board any vessel in the dock, unless authorized by the company or unless permission in writing had previously been obtained from the superintendent of the dock. The company had statutory powers to make by-laws (among other purposes) for regulating shipping, unshipping and removing of all goods within the limits of the dock and for regulating the duties and conduct of all persons, whether the servants of the undertakers or not, employed in the dock. It was held that the by-law excluding that particular class of workmen was beyond the powers conferred by the Act: first, because S. 33 of the Harbours, Docks and Piers Clauses Act, 1847, which was incorporated in the Special Act, had declared that, subject to certain specified conditions in any special Act authorizing the construction of any dock, the harbour, docks and pier should be open to all persons for the shipping and unshipping of goods, and secondly, because a power to make by-laws for regu-

1. (1941) 1 M.L.J. (Supp.) 65: 3 F.L.J. 97: (1940) F.C.R. 110 at p. 135.
2. (1883) 10 Q.B.D. 387.

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lating the duties and conduct of persons employed in the docks could not authorize a by-law excluding a specified class of persons. In the *City of Toronto* v. *Virgo*[1], an Act of the Ontario Legislature had given local authorities the power to make by-laws for licensing, regulating and governing hawkers and petty chapmen; and this was held not to authorize a by-law prohibiting hawkers from plying their trade at all in a substantial and important portion of the city, Lord Davey observing:

"Their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it and indeed the power to regulate and govern seems to imply a continued existence of that which is to be regulated or governed".

Attention was also drawn to other sections of the Act, which gave power to make by-laws "preventing or regulating", or "preventing or regulating and licencing", thus indicating that a power to prohibit, when it was intended that it should be given, was always given by express words. The observations of Lord Davey were quoted with approval by Lord Watson, delivering the judgment of the Judicial Committee in *Attorney-General for Ontario* v. *Attorney-General for Canada*[2], in which it was decided that the power given to the Dominion Parliament by S. 91 (2) of the British North America Act to make laws for the regulation of trade and commerce did not enable the Dominion Legislature to enact legislation to prohibit the traffic in intoxicating liquors. We see no reason to dissent from the view that a power to regulate does not include a power to prohibit; but since neither the word "regulation" itself nor any other comparable expression appears in entry No. 31, it does not appear necessary to pursue the argument further. A power to regulate may well imply the continued existence of the thing to be regulated; but no such implication can arise from the words in the entry which, as we have said, only explain or illustrate the more concise expression which immediately precedes them.

We must again refer to the fundamental proposition enunciated in *The Queen* v. *Burah*[3], that Indian Legislatures within their own sphere have plenary powers of legislation as large and of the same nature as those of Parliament itself. If that was true in 1878, it cannot be less true in 1942. Every intendment ought therefore to be made in favour of a Legislature which is exercising the powers conferred on it. Its enactments ought not to be subjected to the minute scrutiny which may be appropriate to an examination of the by-laws of a body exercising only delegated powers, nor is the generality of its power to legislate on a particular subject to be cut down by the arbitrary introduction of far-fetched and impertinent limitations. It was even contended on behalf of the appellant that the specifying of a particular subject-mater of legislation necessarily indicated the intention of Parliament that that subject-matter should be preserved, since, unless it were preserved, there would be no subject-matter about

1. (1896) A.C. 88.
2. (1896) A.C. 348, at p. 363.
3. (1878) 3 App. Cas. 889.

which to legislate. This argument is sufficiently refuted by the presence in List II of such legislative subjects as "unemployment" in entry No. 32 or "gambling" in entry No. 36.

The second point raised on behalf of the appellant was that S. 19 (4) of the Act of 1915, as amended by the Act of 1940, is invalid because repugnant to S. 297 (1) (*a*) of the Constitution Act. We confess that we have difficulty in appreciating this argument. S. 297 (1) (*a*) enacts that no provincial Legislature or Government shall, by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in the List relating to the production, supply and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description. It is plain beyond words that this provision only refers to legislation with respect to entry No. 27 and entry No. 29 in the Provincial Legislative List; it has no application to legislation with respect to anything in entry No. 31. A provincial Legislature, if it desires to pass a law prohibiting export from or import into the Province, must therefore seek for legislative authority to do so in entries other than entry No. 27 or entry No. 29. If it can point to legislative powers for the purpose derived from any other entry in the Provincial Legislative List, then its legislation cannot be challenged under S. 297 (1) (*a*). There is no substance at all in the appellant's argument on this point.

The appellant's third point is no less unsubstantial. The Act of 1915 required, as the law then stood, and in fact received, the assent of the Governor-General. This, according to the appellant, made it a Governor-General's Act within the meaning of S. 108 (2) (*b*) of the Constitution Act, and therefore the introduction of any Bill amending it required the previous sanction of the Governor-General. The amending Act of 1940, did not receive this previous sanction, and since it received the Governor's assent only, the defect was not cured by the provisions of S. 109 (2) of the Constitution Act. The Governor-General's Act however to which S. 108 of the Constitution Act refers means, and can only mean, an Act such as the Governor-General is empowered to enact under S. 44 of the Constitution Act. The appellant seems to have forgotten that all Acts required the Governor-General's assent before the present Constitution Act came into force; and that therefore, if his argument is sound, this strange result would follow, that every Act passed by the Central or any local Legislature before 1st April, 1937, would be a Governor-General's Act, and no Bill repealing or amending it could be introduced without the previous sanction of the Governor-General. It is preposterous to suppose that Parliament intended to place fetters of this kind on the general legislative powers of Legislatures in India.

It was faintly suggested that, in the absence of any provision for compensating those whose livelihood might be taken away by the enactment of Prohibition, it ought to be assumed that the Legislature had not been given power to enact it. Where a statute is ambiguous, the presumption that a Legislature does not

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intend to interfere with vested rights is no doubt re-inforced by the absence of provisions for compensation; but where the language is clear and there is no ambiguity, as we hold to be the case here, there is no room for such arguments.

For the above reasons we are of opinion that the Bihar Excise (Amendment) Act, 1940, which amended S. 19 (4) of the Bihar and Orissa Excise Act, 1915, was a valid Act and was within the powers conferred upon the provincial Legislature by S. 100 (3) of the Constitution Act and entry No. 31 of the Provincial Legislative List.

Having regard to the view which we have taken of the effect of the Act of 1940, it is not necessary for us to consider, as we might otherwise have found ourselves compelled to do, the earlier judgment of the Patna High Court to which we have already referred and which followed a judgment of the High Court of Bombay in which similar questions were raised: *Sheth Chinubhai Lalbhai* v. *Emperor*[1]. We do not therefore express any opinion with regard to those two judgments, except in respect of one matter on which we think it desirable to say a few words, because it was also the foundation of part of the argument addressed to us in the present case. Both the Bombay and Patna High Courts seem to have been a good deal influenced by the view that the Acts they were considering were exclusively excise or revenue Acts and that nothing was to be found in them indicating the intention of the Legislature that they were to be, or could be, used for the purpose of promoting a policy of total or partial Prohibition. In the case of Bihar, it was sought to overcome this difficulty at a later date by the insertion in the amending Act of 1940 of the additional paragraph in the preamble to the original Act of 1915, which we have already cited. The purpose for which resort may be had to the preamble of a statute has been stated in a well-known passage:

> "If any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer, is a 'key to open the minds of the makers of the Act, and the mischiefs which they intended to redress':"

Income-Tax Commissioners v. *Pemsel*[2]. But we doubt very much whether a preamble retrospectively inserted in 1940 in an Act passed 25 years before can be looked at by the Court for the purpose of discovering what the true intention of the Legislature was at the earlier date. A Legislature can always enact that the law is, and shall be deemed always to have been, such and such; but that is a wholly different thing from imputing to dead and gone legislators a particular intention merely because their successors at the present day think that they might or ought to have had it.

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1. I.L.R. (1940) Bom. 587.
2. (1891) A.C. 531, per Lord Halsbury, L.C., at p. 542.

It is however by no means clear to us that the Legislature of Bihar and Orissa (as the Province then was) in 1915 never had in mind the possible use of the Bihar and Orissa Excise Act, 1915, for the promotion of a policy of total or partial prohibition. The Act of 1915 was, as we have said, a consolidating and amending Act which replaced an earlier consolidating and amending Act, the Bengal Excise Act, 1909. An examination of the statutes which were consolidated in the latter Act shows that the provision which is now S. 19 (4) of the Act of 1915, and which the Act of 1940 amended, first made its appearance on the statute-book in 1909; that is, it never formed part of the original Excise Code. A sub-section similarly expressed is to be found in the legislation of other Provinces; and, so far as we can ascertain, it was in every case an addition to the original Code. Thus, in Madras, where it now appears as S. 13-A of the Madras Abkari Act, 1886, it was inserted as a separate and substantive section by the Madras Abkari (Amendment) Act, 1913. In Bombay it appears as S. 14-B (2) of the Bombay Abkari Act, 1878, but it was inserted in that Act for the first time by the Bombay Abkari (Amendment) Act, 1912. Its history in other Provinces also will be found to be the same.

There is no reason in theory or principle why an Excise Act should not have a double object, the benefit of the revenue and the improvement of public health or morals by a greater control of the liquor trade; the Licencing Acts in England are an example. We find it not easy to understand the purpose or object of S. 19 (4), if it were not intended for the purpose of promoting the cause of temperance, whether by means of the policy which used to be known as local option or by means of total Prohibition; and its appearance on the statute-book in so many Provinces in the course of the same generation is a proof that temperance doctrines were, as indeed is common knowledge, attracting public notice at that period over a considerable part of India. The only novelty about more recent legislation is that it goes further and is more radical in character.

If it were necessary for us to do so, we should not hesitate, in construing the Bihar Act of 1915, to reject the argument sought to be based on the assumed absence of any intention on the part of the Legislature to deal with the question of Prohibition in its excise legislation. For the reasons which we have given, we should be disposed rather to draw from the language of the Act a different inference altogether; but the view we take in the present appeal makes the question no longer important.

The appeal must be dismissed. There will be no order as to costs.

B.V.V. *Appeal dismissed.*

Maharani Gurucharan Kaur of Nabha v. Province of Madras.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN AND MR. JUSTICE SOMAYYA.

Maharani Gurucharan Kaur of Nabha and another. .. *Appellants** (*Plaintiffs*)

v.

The Province of Madras, through the Collector of Madura and others .. *Respondents* (*Defendants* 1 *to* 5).

Government of India Act, 1935, *S.* 270 (1) *and* (2)—*Wrongful detention—Parties prevented from boarding train—Police Officer instructing subordinate to confine—Suit for damages for wrongful detention—Acts done* bona fide—*Sanction of Governor if necessary—Limitation Act* (*IX of* 1908), *Art.* 2—*Applicability—Criminal Procedure Code* (*V of* 1898), *S.* 54—"*Requisition*"—*Telephonic message—Police Act* (*V of* 1861), *Ss.* 21 *and* 53—*Special period of limitation.*

The first plaintiff was the wife and the second plaintiff the daughter of the Ex-Maharaja of Nabha. They filed a suit for damages for wrongful detention against the Province of Madras through the Collector of Madura and four Police Officials one of whom was the then District Superintendent of Police at Madura, the other a Sub-Inspector of the Government Railway Police at the Madura Railway Station and the remaining two, Head Constable and Constable of the Railway Police at the Kodaikanal Road Railway Station. The plaintiffs complained that on the arrival of the train at Kodaikanal Road Station, by which they intended to start for Madras they were prevented by the Police Sub-Inspector acting under the orders of the District Superintendent of Police from boarding it and that the gate and the iron fencing at the Railway station were also closed by the Sub-Inspector of Police and Constables were posted near the gates which resulted in the wrongful confinement of the plaintiffs. It was shown that the Sub-Inspector of Police prevented the plaintiffs from boarding the train on receipt of a telephonic message from the District Superintendent of Police. It appeared however that the Police Officers had intended to detain the ex-Maharaja of Nabha and not the plaintiffs, and that the latter were prevented from boarding the train owing to a misunderstanding of a telephonic message sent by the District Superintendent of Police to the Sub-Inspector. Subsequently they were allowed to take train and reach their destination. The plaintiffs sued for damages for the suffering, both mental and physical, and for the pecuniary loss caused to them. They averred that the defendants' acts in detaining them were done by them in their official capacity. It was contended on behalf of some of the defendants that the plaintiffs were not entitled to maintain the suit without the consent of the Governor of Madras as required by S. 270 (1) of the Government of India Act and that the suit was also barred by S. 53 of the Madras Police Act.

Held (1), that on the facts, it could not be said that the plaintiffs were actually confined in the Railway station or the Railway compound at Kodaikanal.

The offences of wrongful restraint or wrongful confinement are offences affecting human body and cannot be said to have been committed if a person is not restrained or confined himself, but only the liberty of going in the conveyance in which he wishes to go or taking the article which he wishes to carry and without which he is not willing to proceed is denied to him.

Had the plaintiffs or their Secretary requested the Sub-Inspector or the Constables to be allowed to go out of the Railway compound and had any obstruction been created it would have been a different matter.

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(2) that the acts of defendants 2 to 5 which were complained of were done in the performance of their duty and that the suit was not maintainable without the consent of the Governor under S. 270 (1) of the Government of India Act of 1935. And as the acts complained of were done by the said defendants in good faith the suit had to be dismissed against them under S. 270 (2) of the Government of India Act. In such a case the onus of proving want of good faith was on the plaintiffs.

(3) that the suit was governed by Art. 2 of the Limitation Act as defendants 2 to 5 were acting under S. 54, Criminal Procedure Code and S. 21 of the Police Act, and time should be computed from the date of the occurrence and not from any subsequent date when plaintiffs might have suffered physical injury consequent on the detention.

There is no warrant for the proposition that a Police Officer cannot order the arrest of a person by means of a telephonic message. The word "requisition" in S. 54 (1) (*ix*) is quite general and clearly covers a message communicated by telephone, although it will be necessary for him when he is asking another Police Officer to do what he could have done himself to disclose not only the identity of the person whom he wishes to be arrested but also the offence or the reason for which the arrest is to be made. This has to be done for the reason stated in the last clause of S. 54 (1).

The Police Act does not deal with administrative matters of the Police as a department but with matters and duties which they in their official capacity are called upon to undertake and discharge. There is no warrant for the contention that S. 21 of the Police Act is applicable between Police officers *inter se* and has no application when they are dealing with private individuals.

(4) that the suit was barred by limitation also under S. 53 of the Police Act as defendants 2 to 5 purported to act in the discharge of their duty under the said Act.

(5) that the first defendant, the Province of Madras, could not be proceeded against for the acts of defendants 2 to 5 done in the discharge of their duty imposed on them by statute.

The Government cannot be held liable either when an officer takes an action in pursuance of a statutory duty or when the act committed by him happens to be in excess of his authority unless in the latter case the act is either done by the Government's orders or is subsequently ratified and adopted by it. Nor could any action be maintained against the Government for a tort committed by its servants if in passing the order in the performance of which the tort was committed the Government was discharging its governmental functions as a sovereign.

Appeal against the decree of the Court of the Subordinate Judge (Additional) of Madura, dated 21st November, 1938, and passed in O.S. No. 31 of 1937.

K. Bhashyam Aiyangar for Appellants.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The judgment of the Court was delivered by,

Abdur Rahman, J.

Abdur Rahman, J.—This appeal arises out of a suit for damages brought by two ladies, the first plaintiff being a wife and the second plaintiff a minor daughter of the ex-Maharaja of Nabha against the Province of Madras through the Collector of Madura and four police officials one of whom was the then District Superintendent of Police at Madura, the other a Sub-Inspector of the Government Railway Police at the Madura Railway Station and the remaining two, head constable and constable of the Govern-

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ment Railway Police stationed at Kodaikanal Road Railway Station in the Madura District. The facts that have led to the institution of this suit may be first stated.

Nabha is an important Sikh state in the Punjab which was being ruled since 1911 by the first plaintiff's husband. He was interned in 1928 at Kodaikanal—a hill station in the Madura District—by an order of the Government of India to which reference is made in a memorandum (Ex. VII-*b*) issued by the Government of Madras to the District Magistrate, Madura on the 22nd February, 1928, (the year 1922 typed in the letter being obviously a mistake for 1928). A second memorandum No. 477-3 (Political), dated the 22nd June, 1928 (Ex. VII-*c*) issued by the Under-Secretary to the Government of Madras to the District Magistrate, Madura shows that the Government of India, although not desirous of imposing a close supervision over the ex-Maharaja of Nabha, yet wanted a 'watch to be maintained by the police at any Railway Station where the detenu 'was' likely to entrain and steps to be taken to ensure his rearrest in the event of his absconding'. This memorandum also discloses the fact that the Government of India had then forbidden the ex-Maharaja from absenting himself from his residence at night but this condition is stated by him in his evidence to have been relaxed later. The existence or non-existence of such a condition is however irrelevant for the purposes of this case and may be left out of consideration. It would appear from a third memorandum No. 477-6, dated the 22nd August, 1928 (Ex. VII-*d*), that the movements of the ex-Maharaja were under the orders of the Government of India to be restricted to Kodaikanal municipal limits. A copy of this memorandum was also issued to the Inspector-General of Police who communicated the decision of the Government to the District Superintendent of Police at Madura on the 24th August, 1928 (Ex. VII). Since then the ex-Maharaja has been living in Kodaikanal and had with the object of keeping their company and of, as he says, giving "them a send-off", accompanied the plaintiffs in their car on some occasions when they wished to visit Madras, but is not stated to have transgressed the Kodaikanal municipal limits.

From a letter written by Mr. Ganesan (P.W. 6) on behalf of the first plaintiff on the 11th January, 1937, to the Station Master Kodaikanal Road (Ex. F) asking a first class compartment to be reserved, it appears that she originally intended to leave Kodaikanal Road by the Trivandrum Express on Tuesday, the 12th January, 1937, but as no reply was received by him in time, they decided to leave Kodaikanal Road by the same train on the next day, *i.e.*, on the 13th January, 1937 (Ex. F-1). She eventually left Kodaikanal on 13th January, 1937, at about 5-30 P.M. with her daughter the second plaintiff. About half an hour after their departure, a telegram (Ex. IV) was despatched by the Station House Officer, (a head constable), to the District Superintendent of Police, Madura North, which reads as follows:

"Ex-Maharaja departuring to Madras Spencer Hotel with family in Car M.D. 2037".

This led the District Superintendent of Police to wire (Ex. V) to the Sub-Inspector, Kodaikanal, to prevent the ex-Maharaja from leaving Kodaikanal. But it was unnecessary to take any action on that telegram as another telegram (Ex. VI) was despatched by the Station House Officer at 7-30 P.M. in the meantime informing the District Superintendent of Police that the ex-Maharaja had 'returned on sending family'. The District Superintendent of Police had anyhow to take action on the information contained in Ex. IV before the receipt of Ex. VI. He decided therefore to communicate his orders to the Sub-Inspector at the Madura Railway Station by telephone to go to Kodaikanal Road Station and prevent the ex-Maharaja from leaving that station. This order was not correctly understood by the Sub-Inspector and it was the misunderstanding of this message on his part that led him to detain the first plaintiff and resulted in the institution of the suit out of which the present appeal arises.

Mr. Cameron (the second defendant) was examined in this case as a witness (D.W. 5). He deposes to having communicated the following message on the telephone:

> "Ex-Maharaja of Nabha and family were reported to be leaving Kodaikanal, that it is probable that the party would be taking the Trivandrum Express at Kodaikanal Road Station, that the Sub-Inspector should prevent the ex-Maharaja from catching that train''.

The Sub-Inspector however states in pargraph 9 of the cross examination that he could not follow to start with whether the order of detention was in respect of the ex-Maharaja or the Maharani but with a reply to a question put by him on the telephone to the District Superintendent of Police, he was satisfied that the latter wanted the Maharani to be detained. According to Mr. Cameron, on the other hand, no question was put by the Sub-Inspector that might have led him to detect the mistake as to the identity of the person to be detained and the only difficulty that the Sub-Inspector had in understanding his message was with the word Nabha which he (the Sub-Inspector) did not follow and which he was confusing with the word 'Nadar'. Be that as it may, it was apparently for the District Superintendent of Police who must have been aware of his Sub-Inspector's capacity to follow a message in English and whose attention was drawn to the difficulty exhibited by the latter in understanding the former's message to be circumspect and to take steps to ensure that his orders were properly understood.

On receipt of the telephonic message and understanding that the first plaintiff was to be detained, the Sub-Inspector left Madura by the Trivandrum Express that was about to start when the message was received by him and arrived at Kodaikanal Road Station at about 8-15 P.M., eleven minutes after the usual time for its arrival.

The first plaintiff who had arrived at the Kodaikanal Road Station at about 7-45 P.M. was awaiting the arrival of the train in her own car which was placed in the Railway compound fenced on three sides by iron fencing and on the fourth side by the railway premises containing three or four rooms occupied by the Station-

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Master, Spencer's refreshment room, a waiting room for the higher class passengers and a verandah. The iron fencing has a gate through which the cars come into the compound.

The Sub-Inspector who had seen a first class compartment reserved for the first plaintiff at an intermediate station between Madura and Kodaikanal Road, ascertained from the fourth defendant on his arrival at Kodaikanal Road Station, if the first plaintiff had arrived. On being informed that she had and in view of what he had understood at the time to have been the orders of the District Superintendent of Police, he prevented the first plaintiff's Secretary from placing her luggage which he was trying to keep, in the compartment and communicated to the first plaintiff through her Secretary the orders that he, *i.e.*, the Sub-Inspector had understood to have received from the District Superintendent of Police, Madura. The plaintiff complains that on the arrival of the train not only was she prevented by the Sub-Inspector from boarding the train but that the gate in the iron fencing was also closed under his instructions and the two constables (Defendants 4 and 5) were placed near the gate which resulted in wrongful confinement or imprisonment of the plaintiffs. Since Mr. Bhashyam, learned counsel for the appellants, referred to the confinement not only for the purpose of enhancing the damages but as an additional ground for making the Sub-Inspector and the two constables liable, we would have to examine this contention in detail later. It is sufficient however to say for the time being that the contention advanced by the plaintiffs' learned counsel that the third defendant would in any case be liable for having exceeded his instructions and confining his clients within the Railway compound instead of permitting them or rather the first plaintiff from boarding the train, was not advanced in the lower Court and is being put forward for the first time in this Court.

Either in view of some alteration between the plaintiff's Secretary and the Sub-Inspector or on account of the former's request in the vain hope of the plaintiffs being permitted to travel by the Trivandrum Express, the train was detained for about eight minutes longer than the scheduled time for its stay but it is unnecessary to go into these minor details, as they do not seem to bear on the questions that have to be deermined in this appeal. We know it for a fact that the plaintiffs were not allowed to board the train and that the Sub-Inspector sent a telegram (Ex. O) after it had left to the District Superintendent of Police, Madura North at 8-42 P.M. which reads as follows:

"Detained Maharani of Nabha from going by six (the number by which the Trivandrum Express is known) as per your orders advise as to what to do".

To this the following reply (Ex. III) was despatched by Mr. Cameron at 9-20 P.M.:

"Your orders were to detain Raja and not Maharani. Maharani may proceed anywhere and you should afford any assistance which the Maharani may require".

This was received at Kodaikanal Road Telegraph Office at 9-25 P.M. and delivered to the Sub-Inspector at 9-45 P.M. according to the time of its receipt as given at the corner of the telegram presumably by the Sub-Inspector. Shortly after this the plaintiffs were allowed to go. It seems that the plaintiffs then went to the Spencer's refreshment room (*vide* Ex. XIII) for a short time and in spite of a telegram (Ex. K-1) that was sent by the plaintiff's Secretary to the Station Master, Trichinopoly, which reads as follows:

"Maharani Nabha arriving by car to catch six, please detain reserve 4 first, 2 seconds, Madras";

they could not catch the train as they arrived at that station only at about 1-30 A.M. while the train must have left it about two hours earlier. They left Trichinopoly eventually by the Dhanushkodi Passenger at about 4-30 A.M. on the 14th January, 1937, reaching Madras at about 2-30 P.M. on the same day.

Paragraphs 7, 17 and 18 of the plaint state the grounds on which the plaintiffs want to make the various defendants liable for damages for the suffering—both mental and physical—humiliation caused to the plaintiffs and last of all pecuniary loss suffered by them. As reliance was placed by the Government Pleader on the allegations in these paragraphs in support of his objection that the suit was not maintainable against the defendants 2 to 5 under S. 270 (1) of the Government of India Act, it would be useful to reproduce them in extenso. They read as follows:

"7. The said acts of the defendants 2 to 5 were purported to be done by them in their official capacity and are quite irregular and there is no lawful justification for the said acts of the said defendants, and have all the appearance of official high-handedness. The said wrongful acts of the said defendants 2 to 5 restraining the liberty of the plaintiffs by show of authority have resulted in complete deprivation of liberty of the plaintiffs and amount to false imprisonment.

17. Since the invasion of the plaintiffs' right to freedom has been committed in the course and as part of the official employment and alleged to be within the scope of his official authority, the first defendant is also liable in law to the plaintiffs.

18. As the defendants 3 to 5 have acted under the direction of the second defendant and as the defendants 2 to 5 have thereby joined in committing the said wrongful acts, they are also liable in the same way to the plaintiffs in damages".

Relying upon the information contained in the telegrams that were sent by the Station House Officer, (Exs. IV and VI), it was contended on behalf of the defendants that the ex-Maharaja of Nabha had also accompanied the persons who had left his house along with the plaintiffs on the 13th January, 1937, but that he had subsequently returned. The fact that the plaintiffs were detained at the Kodaikanal Road Station was not denied but it was alleged on behalf of the defence that the telephonic message given by the District Superintendent of Police, Madura North, to prevent the ex-Maharaja of Nabha from proceeding by the Trivandrum Express was not correctly heard by the Sub-Inspector of Police and being under the *bona fide* impression that he was asked to prevent the first plaintiff from going by that train, he communi-

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cated the orders to her through her Secretary and stopped her from boarding the train. It was denied however that the Sub-Inspector of Police had ordered the defendants 4 and 5 to close the gates or to post themselves near it or had wrongfully confined the plaintiffs. The 'acts done by the defendants 2 and 3 were' pleaded to have been 'done by them in their official capacity in the lawful exercise of their duties' and 'the third defendant' was said to have 'acted *bona fide* in not allowing the plaintiffs to proceed by the Trivandrum Express train'. It was asserted that "the plaintiffs were informed through the Secretary that they could go anywhere except the train". The allegations that the first plaintiff was not in good health or that there was loss of sleep or loss of appetite or bronchial affection on that score or that there was mental pain and physical discomfort, pecuniary loss and humiliation were denied.

Not being content with the denial of the injury caused to the plaintiffs, insult was added to it by not admitting the alleged position of the plaintiffs in life and their status by which apparently it was meant that they were not the wife and daugher of the ex-Maharaja. We would have understood paragraph 15 of the first defendant's written statement to mean that the plaintiffs' designation as 'Maharani' and 'Princess' was being disputed had it not been for the cross-examination of the first plaintiff on behalf of the defendants in paragraphs 28 and 29 which leads us to infer that the status of the first and second plaintiff as the ex-Maharaja's wife and daughter was not being admitted. This was wholly opposed to the letters (Exs. T, T-1 and T-2) written by the Private Secretary to His Excellency the Viceroy to or on behalf of the first plaintiff in August, 1933, when she was even referred to as Junior Maharani of Nabha although the correct form of address in regard to her given by the Chief Secretary to the Government of Madras in an extract of a confidential demi-official letter written to the District Magistrate of Madura (Ex. XIV) is stated to be different. Whether this new formula of address was evolved at that time or earlier, it is unnecessary to ascertain. But it appears to have evoked a serious protest on behalf of the first plaintiff (*see* Exs. S and XI-*a*) and may have been to some extent responsible for this litigation, as it is quite possible that if she had been addressed by Mr. Cameron as Maharani in Ex. VIII, the letter would not have remained unopened and this litigation would not have in all probability started. After all she was referred to as 'Maharani' seven months later (Ex. R) by no less an officer than the Deputy Inspector-General of Police when he was directed by the Government of Madras to see her with the object of apologising 'on behalf of the Police for the very discourteous treatment she received at the hands of the Railway Police at Kodaikanal Road Station'; but by then the suit had been instituted and the case was stated to have gone out of her hands (Ex. XII-*a*). We cannot help expressing our regret however that due advantgge was not taken of the Government's gesture of goodwill. This is however only by the way and can have no effect on the determination of the various questions that arise in this appeal.

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To revert to the pleas raised on behalf of the defendants. Since the first defendant had not authorised anything to be done to the plaintiffs and there was no ratification on its behalf of anything done by the other defendants, the first defendant's liability for the action of the other Government servants who had either acted or purported to act under the statuory powers conferred on them was denied. Reference was made in the end to the written apology sent by Mr. Cameron (Ex. VIII) to the first plaintiff as soon as he had become aware of the unintentional mistake committed by the third defendant and attempts that were subsequently made to have an interview with the first plaintiff for the same purpose, although they can have no bearing on the liability of the various defendants, if they or any one of them are or is found to be liable—whatever effect they may have on the quantum of damages in case the main issues are decided against them. The validity of the notice served on the first defendant was disputed and the suit was alleged to have been barred by limitation. It was contended on behalf of the defendants 2 to 5 that the plaintiffs were not entitled to maintain the suit without the consent of the Governor of Madras as required by S. 270 (1) of the Government of India Act and that the suit was also barred under S. 53 of the Madras District Police Act (Act XXIV of 1859).

In a judgment that is fairly well-discussed the learned Subordinate Judge of Madura came to the conclusion that the third defendant had ordered the closure of the eastern gate of the Railway compound in order to prevent the first plaintiff from proceeding by car with the object of boarding the train at any other station like Dindigul and Trichinopoly and that under his orders the defendants 4 and 5 'had totally and effectively restrained the freedom of the plaintiffs so as to cause false imprisonment'. In answer to the issue whether the defendants 2 and 3 (the District Superintendent of Police and the Sub-Inspector) were acting *bona fide* in the lawful discharge of their duties, the learned Subordinate Judge was of opinion that they had acted *bona fide* and although the second defendant had acted in the lawful discharge of his duties, the third defendant had not done so and was not protected by law. As to the first issue which related to the bars under S. 53 of the Madras District Police Act and S. 270 (1) of the Government of India Act, the learned Subordinate Judge fouund that under the latter section the sanction of the Governor of the Madras Province was a condition precedent for the maintainability of the suit; but S. 53 of the Madras District Police Act did not apply to the facts of the present case. As for the liability of the Province of Madras, he held that although S. 179, sub-Cl. 1 of the Government of India Act was not a bar, the plaintiffs had no cause of action against it as defendants 2 to 5 were not acting as agents of the Government and the principles of implied authority to act on behalf of the latter or of the liability of a master for the wrongful acts done by his servant in the course of the latter's employment were not applicable. As to the question of limitation he held that in so far as the act of the second defendant was in pursuance of S. 54 of the Code of Crimi-

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nal Procedure, the suit was barred by limitation against him but not against the other defendants. The issues in regard to the validity of the notice under S. 80 of the Code of Civil Procedure and relating to misjoinder of defendants were not seriously pressed on behalf of the defendants. As for the quantum of damages the learned Subordinate Judge was of opinion that if the case were to be decreed in favour of the plaintiffs a sum of Rs. 5,000 would have been enough in the circumstances of the case; but having regard to the conclusion in regard to the legal objections raised on behalf of the defendants, he was of the opinion that the suit was not maintainable. It was therefore dismissed. The plaintiffs appeal.

From the facts that have been stated and the pleadings of the parties that have been briefly summarised, it would be clear that there is no dispute in regard to the essential facts of this case.

Whether the ex-Maharaja of Nabha had actually left his house on the 13th January, 1937 and had returned as mentioned in the telegram Ex. VI or had not left his house on that day at all, it is unnecessary to decide although we are inclined to accept the ex-Maharaja's testimony, and feel that the second telegram (Ex. VI) was sent by the head constable (Station House Officer) after he had discovered that the first one (Ex. IV) was sent under a mistake. It seems that Sebastian (D.W. 9), a police constable in the intelligence department had received 'information at 11 A.M. on the 13th January, 1937, that the ex-Maharaja of Nabha and Rani (the first plaintiff) would go with their family to Spencer Hotel Madras' and this information was communicated by him to Ghulam Dastagir (D.W. 8) head constable 988 on the same day. Either relying on the information that he had received during the day or as a result of the working of a heated imagination, Sebastian seems to have jumped to the conclusion that the ex-Maharaja had left Kodaikanal when he saw his cars pass by and asked D.W. 8 to wire to the District Superintendent of Police Madura and to the other officers mentioned in the latter's statement of the ex-Maharaja's departure. Even if the ex-Maharaja had left his house by car—a fact which we have already stated we are not prepared to believe—that should not have been sufficient for either Sebastian (D.W. 9) or Gulam Dastagir (D.W. 8) to wire to the authorities as the ex-Maharaja had been accompanying his wife and daughter even before up to the Municipal limits when they wished to visit Madras and this must have been known to them.

As to the question whether Mr. Cameron (the second defendant) had asked the Sub-Inspector (the third defendant) to detain any person other than the ex-Maharaja, it is true that the message which Mr. Cameron deposes in his evidence as D.W. 5 to have sent was not reduced to writing. It is not therefore possible to say whether the message given by the witness in his deposition and reproduced in an earlier portion of this judgment was exactly what he has now stated it to be. But as the telegram Ex IV referred to the departure of the ex-Maharaja,

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the telegram Ex. V which Mr. Cameron had given at or about the time when he telephoned his orders to the Sub-Inspector also refers to the 'Nabha ex-Raja' to be prevented from leaving Kodaikanal and the telegram Ex. III which he sent in reply to Ex. O reiterates that the orders were "to detain the Raja and not Maharani" there cannot be much room for doubt that he must have asked the ex-Maharaja alone to be detained although it is possible to conceive that the word 'party', if used by him, as both he and the Sub-Inspector depose to its having been used on the telephone, might have led the Sub-Inspector D.W. 1 (who had read up to fourth form only) to think that the order of detention applied to all those as well who were or were to be with the ex-Maharaja. The Sub-Inspector would not however admit this and states, as we have already noticed elsewhere, that his definite instructions were to detain the first plaintiff. Moreover the District Superintendent of Police knew that it was the ex-Maharaja alone who was debarred under Government orders from leaving the Municipal limits of Kodaikanal. In the absence of any other indication or suggestion as to the motive for the first plaintiff's detention, we cannot but conclude that Mr. Cameron must have ordered the ex-Maharaja alone to be detained. There is no doubt however that the Sub-Inspector (defendant 3) understood that the orders were in regard to the first plaintiff and it was on that basis that he acted until the telegram Ex. III was received by him.

We will advert to the effect of this finding later but we cannot help deprecating at this stage that a responsible officer like the District Superintendent of Police should have depended solely on the telephonic message and should not have followed it up by a confirmatory telegram or letter particularly when he was dealing with the liberty of an ex-Ruler of an important Indian State. Had Mr. Cameron taken the trouble to send a telegram to Kodaikanal Road Station confirming his orders and sent a letter with a constable in a car, the mistake of detaining the plaintiffs would not have been committed and this unfortunate litigation would have been avoided.

Moreover, the use of the word 'detain' which was in all probability used by Mr. Cameron on the telephone, was also unfortunate. It is used both in the sense of keeping one in confinement as also for keeping him in waiting or hindering him. It cannot be denied that to a policeman, particularly when he does not happen to be very well-educated, the word detain would ordinarily suggest the first meaning rather than the second or the third. The use of this word by Mr. Cameron to the Sub-Inspector and the use of it by the latter when communicating the former's orders to the first plaintiff's Secretary could have been and was probably taken to mean that the first plaintiff was intended to be confined to the place where she happened to be at the time *i.e.* in the car in the Railway compound. And if the constables (defendants 4 and 5) were posted near the gate—and we are inclined to agree with the finding arrived at by the lower Court in this respect that they were placed there by the Sub-Inspector—the conclusion would be irresistible that the first paintiff must have thought that she was confined within the Railway fencing where her car

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was standing and would not be permitted to leave it if she tried so to do. If that was the impression created in her mind, we can very well understand why the first plaintiff did not ask any person if she could go out of the compound and why she did not leave the car. That must have been her feeling from the subjective point of view; but that would not be enough for us to hold that she was actually confined or imprisoned and not merely restrained from proceeding by the Trivandrum Express. Had there been proof on the record that there was total restraint of the first plaintiff's movements or liberty during the period that she was in her car by the use or threat of force or by confinement, she could be said to have been imprisoned. Our attention was drawn in this respect by learned counsel for the appellants to the evidence of P.W. 4, P.W. 5 and P.W. 6. There is no doubt that in answer to a request by the Secretary (P.W. 6) "to ask the constables to open the gate on the east so that they could go" the Sub-Inspector (D.W. 1) is reported to have said that "he could not allow them to go unless he received instructions from the District Superintendent of Police". But if this is taken along with what the witness (P.W. 4) stated in paragraph 11 of his cross-examination which reads as follows:

> "Through the upper class waiting room one can come to the platform and go out through the third class waiting room. There was no obstruction from anybody to go like that but no car can go that way",

it would appear that there was no total restraint on the plaintiffs' movements; but what the witness was trying to convey was that by closing the gates, the car could not have been taken out of the station compound and as the plaintiffs could not have left the Kodaikanal Road Railway Station without the car, they must be taken to have been virtually confined. Similarly, P.W. 6 who is no other than the plaintiff's own Secretary stated in his examination in chief that the Sub-Inspector D.W. 1 said that

> "his orders were to detain the Maharani . . . . . He did not say she could be detained there and would not be allowed to go anywhere . . . . I did not ask the Sub-Inspector, if there was any objection to the Maharani going back to Kodaikanal or to her going by car though not by train".

Having regard to these statements, we cannot attach any importance to the statement of P.W. 5 that the first plaintiff was not allowed to go and was told that she '*should stay there*'.

Learned counsel for the plaintiffs laid considerable stress on the advice sought by the Sub-Inspector in his telegram (Ex. O) after he had succeeded in preventing the first plaintiff from boarding the train. We are in agreement with Mr. Bhashyam that the explanation given by the Sub-Inspector in his deposition that by those words he wanted to know what Mr. Cameron wanted the witness to do in regard to his own movements, *i.e.*, whether he might return to Madura is wholly unconvincing and that the Sub-Inspector was apparently enquiring as to how he should act as the first plaintiff had been detained from going by the Trivandrum Express and was then at the Kodaikanal Road Station. But this does not show that the first plaintiff was there because she was confined to the Kodaikanal Road Station, but because she happened to be left behind after the train had left the station without

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her. We are however prepared to admit that by placing the policemen at the gates and by closing the same (although not locking) it would be a legitimate inference to draw that the plaintiffs' car was stopped by the defendants 3 to 5 and would not have been allowed to be taken out. This does not however mean that the plaintiffs were confined and would have been prevented from proceeding in any direction other than possibly to Dindigul or Trichinopoly if they had attempted to do so. On the analogy of the decisions in *Emperor* v. *Lathanu Manaji*[1] and In re *Peria Ponnuswami Gowndan*[2] and In re *Muhammad Usuf Sahib*[3], it was contended by Mr. Bhashyam that if the first plaintiff was not allowed to go in her car in which she had a right to proceed and it was impossible for her to go anywhere without her car, the persons who prevented her from using the car should be held to have confined or imprisoned her wrongfully. It was argued by the learned Government Pleader, on the other hand, that even if the defendants are found to have prevented the car from being taken out of the Railway compound by or at the first plaintiff's instance, they could not be said to have confined or imprisoned the first plaintiff. He cited *Emperor* v. *Ramalala*[4], In re *Venkatramiah*[5] and *Durgapada Chatterjee* v. *Nilamani Ghosh*[6], in support of his contention. It is admitted in this case that the first plaintiff may be, in so far as she was prevented from boarding the Trivandrum Express, taken to have been wrongfully restrained by the Sub-Inspector. But the contention that a person would be said to have been confined merely because he is not allowed to proceed either in his car or conveyance even if no restriction is placed on his person does not seem to us correct. The offences of wrongful restraint or wrongful confinement are offences affecting human body and cannot be said to have been committed if a person is not restrained or confined himself but the liberty of going in the conveyance in which he wishes to go or taking the article which he wishes to carry and without which he is not willing to proceed is denied to him. If the decisions cited by Mr. Bhashyam lay down any different rule we would be, with great deference, unable to concur with them.

We are not for the above reasons, satisfied both on facts and as to law that the plaintiffs were or can be said to have been actually confined either in the Railway compound or even within the limits of Kodaikanal Road Station. Had the first plaintiff or her Secretary made a request to the Sub-Inspector or to the constables for the former to go out of the Railway compound and had any obstruction been created, it would have been a different matter. The onus of proving confinement lay on the plaintiffs and in the absence of satisfactory evidence on the point, it is not possible for us to agree with the lower Court—although it has to be admitted, as we have already observed, that the conduct

1. (1925) 27 Bom.L.R. 1419.
2. A.I.R. 1927 Mad. 506.
3. (1938) 2 M.L.J. 583.
4. (1912) 15 Bom.L.R. 103.
5. (1908) 11 Cr.L.J. 192.
6. (1934) 60 C.L.J. 472.

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of the third defendant was undoubtedly dubious and the user of the word detention makes the statement of the defence witnesses on this point doubtful.

In view of our finding that Mr. Cameron had ordered the ex-Maharaja to be detained, the question of his *bona fides* for ordering the first plaintiff to be prevented from boarding the Trivandrum Express does not arise for consideration. We are equally clear in our minds that the Sub-Inspector was not actuated by any bad or malicious motives either. He was under an honest impression, although a mistaken one, that he was ordered to prevent the first plaintiff from going by the Trivandrum Express. At one stage of the case, Mr. Bhashyam advanced the contention that the Sub-Inspector's conduct was at all events extremely negligent and that he should not be held to have acted in good faith if we were not satisfied that he had proceeded in the matter with due care and caution. But when it was pointed out to him that the definition of the words 'good faith' in the General Clauses Act is materially different from that given in the Indian Penal Code and that it would not be correct in this case to use them in the limited sense in which they were used in the Indian Penal Code, the contention was not pressed. The action of the Sub-Inspector could not be, even if negligent to some extent, held to be malicious or even *mala fide*. We must therefore hold that in preventing the first plaintiff from proceeding by the Trivandrum Express he was acting *bona fide* though erroneously.

Having come to these findings of fact, we are now free to discuss the various questions of law which have been raised on behalf of the various defendants. The first contention advanced by the learned Government Pleader was that inasmuch as the plaintiffs were expressly suing the defendants for acts which were admitted by them to have been done in their official capacity, the suit would not be maintainable without the consent of the Governor under S. 270 (1) of the Government of India Act. It runs as follows:

"No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connection with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion and in the case of a person employed in connection with the affairs of a province, of the Governor of that province in his discretion".

Inasmuch as the act of wrongful confinement or of wrongful restraint was committed in January, 1937, *i.e.*, some months before 'the relevant date' by persons employed in connection with the affairs of a province, it would fall within the ambit of the section if it was done or purported to be done by them in the execution of their duty as a servant of the Crown in India. As the question of the applicability of S. 270 (1) depends primarily on the nature of the allegations made against the public servants in the plaint, for which see *Hari Ram Singh* v. *The Crown*[1], we will

1. (1939) 2 M.L.J. (Supp.) 23: 1939 F.C.R. 159 at 179 and 184.

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have to examine the allegations contained in paragraph 7 of the plaint which we have reproduced earlier in this judgment. The plaintiffs' complaint is that the "acts of defendants 2 to 5 were purported to be done by them in their official capacity" or in other words, in the execution of their duty as servants of the Crown. Since this suit was not instituted with the consent of the Governor, S. 270 (1) clearly constitutes a bar so far as the defendants 2 to 5 are concerned. Mr. Bhashyam however contended that S. 270 (1) would have no application unless the acts were done or purported to be done by these defendants in the execution of their duty. He contended in the first instance that as it was not possible for Mr. Cameron to order any subordinate of his to apprehend or to detain any person by telephone, he could not be stated to have done anything in discharge of his duty. Secondly, it was contended that as, in the absence of any allegation or information that the plaintiffs had committed any offence, it was not possible for the Sub-Inspector of Police to have restrained or confined them, he could not be equally said to have done anything in the execution of his duty. The same argument was advanced with reference to the other two constables who are defendants in the case. Reference was made in this connection by Mr. Bhashyam to S. 54 of the Criminal Procedure Code under which it is possible for a Police Officer to arrest a person without a warrant.

There is no warrant for the proposition that a police officer cannot order the arrest of a person by means of a telephonic message. The word 'requisition' in S. 54 (1) (*ix*) is quite general and clearly covers a message communicated by telephone, although it will be necessary for him when he is asking another Police Officer to do what he could have done himself to disclose not only the identity of the person whom he wishes to be arrested but also the offence or the reason for which the arrest is to be made. This has to be done for the reason stated in the last clause of S. 54 (1). This information will enable a person who is called upon to arrest to know that the person required to be arrested by him could have been lawfully arrested without a warrant by the officer who had issued the requisition. The proposed action being thus within the competence of one who may be described, although not quite accurately, as a principal, the person requisitioned would be doing nothing wrong if he complied with his so called principal's orders and carried them out as his agent.

Our attention was drawn to a decision by a single Judge of the Rangoon High Court in *Mohamed Ismail* v. *King-Emperor*[1], where it was held that the provisions of S. 54 of the Code of Criminal Procedure were limited by S. 56 of the Code and that although it is possible for a Police Officer to arrest on his own initiative or when acting independently any person concerned in a cognisable offence without a warrant, yet, where a subordinate Police Officer was not acting independently but was merely deputed by a superior officer to arrest a person concerned in a cognisable

1. (1935) I.L.R. 13 R. 754.

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offence, the order specifying the person to be arrested and the offence or other cause for which the arrest was to be made must be in writing and the Subordinate Police Officer must notify to the person to be arrested the substance of the order and if so required by such person, show him the order.

Inasmuch as the Police Officer in that case was making an investigation under Chapter XIV of a case under S. 380, Indian Penal Code, which is a cognisable offence, the decision was, if we may say so with respect, fully justified. But if the learned Judge wished to lay down generally that the provisions of S. 54 were to be limited by those of S. 56, Criminal Procedure Code and in all cases it is incumbent upon a superior officer of the police, even when he is above the rank of an officer who is in charge of a Police Station or when he is not making an investigation under Chapter XIV of the Code of Criminal Procedure to comply with the formalities mentioned in S. 56 of the Code, we must with deference express our dissent. S. 54 applies to all Police Officers whether to superior or subordinate. S. 56 only applies to such Police Officers as are in charge of a Police Station or as are making investigations under Chapter XIV. The Officer in charge of a Police Station is defined in S. 4 (*p*), Criminal Procedure Code. Let us suppose that an Inspector-General of Police orders his Deputy Inspector-General of Police or a District Superintendent of Police (all of whom are superior Police Officers and who would not ordinarily be in charge of a Police Station or making an investigation themselves under Chapter XIV) to arrest a person, would it be essential for the Inspector-General of Police to comply with the requirements of S. 56 of the Code of Criminal Procedure? In our opinion, it would not be so necessary. Nor would it be necessary for a subordinate Police Officer, say an Inspector of Police to do so if he gives an order for a person's arrest to another Police Officer as long as the person giving the order is not the Officer in charge of a Police Station and is not making an investigation under Chapter XIV, Criminal Procedure Code. In other words, S. 56 of the Code only applies to cases of Police Officers who are either in charge of a Police Station or who are making investigation under Chapter XIV. If in their capacities as such officers, they depute their subordinates to arrest without a warrant (otherwise than in their presence) they have to give that order in writing. But if they are not acting in that capacity, a compliance with the general provisions contained in S. 54 (1) (*ix*) would be enough.

Had the ex-Maharaja of Nabha left the Kodaikanal Municipal limits and arrived at Kodaikanal Road Station against the orders of the Government of India, he would have been guilty of an offence defined in S. 225 (B), Indian Penal Code and liable to arrest by Mr. Cameron without a warrant, the offence being of a cognisable nature. The Sub-Inspector also knew that the ex-Maharaja could not leave the Kodaikanal Municipal limits and he could have also done the same. If Mr. Cameron could have arrested the ex-Maharaja himself under S. 54 (1) (*i*), it is clear that he could have made a requisition to the Sub-Inspector either in writing or verbally or even by telephone to arrest the ex-Maha-

raja at Kodaikanal Road Station under sub-Cl. (9) of the same section. In making a requisition to arrest the ex-Maharaja at Kodaikanal Road, both the person to be arrested and the cause for which the arrest was to be made must be taken to have been specified and it would have appeared to the Sub-Inspector therefrom that the ex-Maharaja could have been on leaving the Municipal limits of Kodaikanal arrested without a warrant by Mr. Cameron.' It would follow therefore that in asking the Sub-Inspector to detain the ex-Maharaja, Mr. Cameron was not only doing what he was fully entitled to do but was executing a duty that he was bound to discharge in view of the orders of the Government of India conveyed to the Inspector-General of Police in Ex. VII-D and by the latter to the District Superintendent of Police in Ex. VII.

As regards the Sub-Inspector and the two constables Mr. Bhashyam contended that the act done or purported to be done by them must have been in the execution of a duty and in so far as they could not be said to have been under any duty or entitled to arrest the first plaintiff under S. 54, Criminal Procedure Code they clearly exceeded their powers and could not be brought within the ambit of S. 270 (1) of the Government of India Act. In other words, his contention is that in order to attract S. 270 (1), the power and duty to arrest must be clearly found to be existing under S. 54, Criminal Procedure Code and it should not be merely a purported duty or a duty that a person wrongly thought he was bound to discharge. We agree with the learned counsel's contention that the word 'duty' as used in the section of the Constitution Act refers to the actual duty and not what a person merely thinks to be his duty. We also agree that S. 54, Criminal Procedure Code cannot help these defendants. None of its provisions can be held to empower them to restrain or confine the first plaintiff. There was no requisition by Mr. Cameron to arrest the first plaintiff, and even if the request to arrest the ex-Maharaja may be taken to have been wrongly understood as a request to arrest her, there was no disclosure of the offence or other cause for which she could have been arrested. In the absence of any disclosure of an offence or any other cause, it is contended on behalf of the appellants that it was not possible for the Sub-Inspector to detain or arrest the first plaintiff under the provisions of S. 54, Criminal Procedure Code. If S. 54 were the only section under which it would have been possible for the Sub-Inspector to act, there would have been undoubtedly a great deal of force in the learned counsel's contention. But under S. 21 of the Police Act, it is the duty of every subordinate Police Officer, as the third defendant was, to obey the orders of the senior Police Officer as Mr. Cameron, the District Superintendent of Police, happened to be at the time. If therefore Mr. Cameron ordered the Sub-Inspector to arrest or detain the ex-Maharaja, the Sub-Inspector was bound to comply with that order. If in pursuance of such an order, the Sub-Inspector had arrested or detained the ex-Maharaja, he would have been acting in execution of his duty. But if by a mistake in reading or hearing the order, the Sub-Inspector detained some one else as it happened

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in the present case, he could not be said to have been acting in execution of his duty in carrying out the orders of his superior Officer, but nonetheless he can be said to be purporting to carry out an order which he understood to have been passed by Mr. Cameron and which it was his duty to execute. It was in the end urged that under S. 21 of the District Police Act, a Police Officer is bound to execute merely lawful orders and the order to arrest or detain the first plaintiff could not be regarded to be lawful. It was also contended that this section only dealt with disciplinary jurisdiction of the Police Officers and had no application when they were dealing with the public generally. This section provides that it shall be the duty of every Police Officer "to obey and execute all orders and warrants lawfully issued to him". It may be argued, and not without some force, that it would not be open to a subordinate Police Officer to question the legality of the orders of his superiors and that if an order or warrant was lawfully issued to him, it would be his duty to obey and execute the same. In other words, the argument is that the word 'lawfuly' does not qualify the words 'orders or warrants' and merely refers to the method of their issue. *Prima facie* this seems to be correct; but even if it is not so and the word lawfully is found to qualify the words 'orders or warrants', there is no difficulty in overruling this contention. The order to arrest or detain the ex-Maharaja issued by Mr. Cameron was, as has been already held, a perfectly lawful order. It does not become unlawful merely because it was misunderstood by the person who was to execute the same. The only difference would be, as pointed out before, that the Sub-Inspector instead of acting in execution of his duty could only be said to have purported to act in execution of his duty. But either of them is covered by S. 270 (1) of the Constitution Act and cannot legally give rise to a cause of action except with the consent of the Governor. There is also no force in the contention that S. 21 is applicable between Police Officers *inter se* and has no application when they are dealing with private individuals. The orders which they as Police Officers are to give and the warrants which they are to issue will relate largely if not solely to private individuals or to individuals even if they happen to be Police Officials in their private capacity. The Police Act does not deal with administrative matters of the Police as a department but with matters and duties which they in their official capacity are called upon to undertake and discharge.

It is not easy to understand why the lower Court considered that the third defendant's action was not protected by law. He was purporting, to perform a duty which he was bound to discharge. It follows therefore that the plaintiffs must be, both according to their allegation in the plaint and on the merits irrespective of any such allegation, held not to be entitled under S. 270 (1) of the Government of India Act to institute this suit against the defendants 2 to 5 without the consent of the Governor.

We have already held that the actions of the defendants 2 and 3 were *bona fide.* The Police constables (defendants 4 and 5) were similarly bound to obey the orders lawfully issued by the Sub-Inspector and there can be no manner of doubt that what

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they were ordered to do and what they did in pursuance of such orders as were given to them was done by them in the execution of their duties as servants of the Crown in India and was done by them in good faith. Under S. 270 (2) of the Constitution Act all civil and criminal proceedings against such persons have to be dismissed unless the Court is satisfied that the acts complained of were not done in good faith. In other words, the onus of proving want of good faith in the case of such persons and such acts as are referred to in this sub-clause is placed upon the plaintiff or the complainant as the case may be. There is no proof on the record that any of the four defendants (2 to 5) did not act in good faith. Indeed we have found that all of them acted in good faith. For that reason also the case against these defendants must fail.

The incident which led to the institution of this suit occurred as stated before on the 13th January, 1937. The plaint was presented on behalf of the plaintiffs on the 17th June, 1937 after a notice of two months had been given on behalf of the plaintiffs as required by S. 80, Civil Procedure Code. The period of such notice has to be excluded in computing the period of limitation under S. 15, sub-Cl. (2) of the Limitation Act. The civil Courts in Madura were closed on account of summer recess and reopened on the 14th June, 1937. If the period of limitation for a suit of this nature were found to be three months under Art. 2 of the Limitation Act as it has been contended on behalf of the defendants to be, the suit would be barred by time, the last date of its institution in that case being the 14th June, 1937. Learned counsel for the plaintiffs however relies on Articles 19, 36 and 120 and contends that Art. 2 of the Limitation Act would not be, in any case, applicable to the facts of the case. It is urged by him in the alternative that even if Art. 2 of the Limitation Act is found to be applicable, the period of limitation under S. 24 of the Limitation Act should be computed from the time when the injury (*i.e.* the illness in Madras) to the plaintiff resulted in consequence of the happenings of the 13th January.

Art. 19 of the Limitation Act would have been undoubtedly more appropriate if we had been of opinion that the first plaintiff was wrongfully confined or falsely imprisoned. In view of our finding however that she had been only wrongfully restrained, Art. 19 of the Limitation Act would have no application. Art. 36 makes a general provision for suits founded on torts. Provisions for particular cases are to be found in Arts. 19 to 27 and 37 to 49. If a case falls under any of the special Articles, Art. 36 will have no application. It clearly provides that it would have no application if the limitation for acts complained of had been specially provided for. It cannot apply if the malfeasance, misfeasance or non-feasance referred to therein was committed or purported to be committed in pursuance of any enactment in force in British India. Much less can Art. 120 which is a residuary article have any application. It can only be invoked as a last resort and in case no other Article is found to be applicable. If the suit happens to be for compensation for doing an act alleged to have been done in pursuance of any enactment in force for the time being in

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British India, as this happens to be, Art. 2 will have to be applied in preference to either Art. 36 or any other Article referred to above and this is because it has been proved now that the various defendants acted on the 13th January, 1937 or purported to act in pursuance of some enactment. It is true that the use of the word "alleged" by the Legislature in this Article is not happy. It cannot be taken to mean that a mere allegation by a party invoking its assistance or pleading that he had acted or omitted to act in pursuance of an enactment would attract its provisions. But when the act is found to have been done or purported to have been done in pursuance of an enactment, as the acts of defendants 2 to 5 have been found to be, this Article must be held to apply. Relying on the word "alleged" in this Article, learned counsel for the appellants argued that before it could be found to govern the present suit, the allegation by the defendants that they were acting in pursuance of an enactment must have been made by them when they were acting. This is obviously incorrect. First of all, a contention like this assumes that every person who is acting in pursuance of an enactment must not only know at the time when he is acting, the correct title and provision of the Act under which he was authorised to act (as if it happens to be wrong, it may be argued that the correct enactment was not alleged by the person doing the act) but also the provisions of the Limitation Act (which is after all an adjectival law) which make it essential for him to mention his authority for the act done by him. Secondly, this Article applies both to the doing of an act or omitting to do an act; it might be physically possible for a person to speak and to refer to the enactment at the time when he is acting in pursuance of the enactment but what about the omission to act? If a man does not act and is not even present for the simple reason that he did not wish to act, is he even then required to speak and name the provision of law under which he thinks he is not required to act or on account of which he omitted to act? The enactment under which he acted or omitted to act can surely be referred to by him or on his behalf when he is called upon to explain his conduct later. As we have found that the defendants were acting under the provisions of S. 54, Criminal Procedure Code and S. 21 of the Police Act, both of which were and are in force, the suit must be held to be governed by Art. 2 of the Limitation Act.

The contention advanced on behalf of the plaintiffs that column 3 of the Article should be governed by S. 24 of the Act and limitation should not be held to start under Art. 2 from the time when the acts took place but from the time when the injury to the plaintiff (*i.e.* the illness in consequence of her detention) occurred in Madras a few days later has also no force in our opinion. If the act complained of had not given rise to a cause of action until some special damage had resulted therefrom, S. 24 of the Limitation Act might have been of help to the plaintiffs. In so far as their learned counsel vehemently contended and we are not inclined, as at present advised, to disagree with him that the wrongful restraint complained of and found to have been committed would be a tort and actionable *per se*, it could

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have given rise to a cause of action immediately. S. 24 of the Act cannot thus help the plaintiffs and the period of limitation cannot be computed from the time when the injury is alleged by the plaintiffs to have resulted to them.

It was moreover contended by the learned Government Pleader that S. 53 of the District Police Act was also a bar. The relevant provisions of that section read as follows:

> "All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done, either under the provisions of this Act or under the provisions of any other law for the time being in force, conferring powers on the police shall be commenced within three months after the act complained of shall have been committed and not otherwise".

The learned Subordinate Judge overruled this contention as he held that

> "the act could not be said to be one done or intended to be done under the provisions of the Police Act or the Criminal Procedure Code, though the third defendant honestly believed that in doing that act he was carrying out the orders of the District Superintendent of Police and though that was an act done by him in execution of his duty as a servant of the Crown in India".

No reason has been given by him why S. 54, Criminal Procedure Code or S. 21 of the Police Act to which reference was made by him in the preceding sentence had no application to the defendants. We have in an earlier part of this judgment discussed the question and taken pains to show that the acts of these officers were covered by the provisions of the Criminal Procedure Code and those of the Police Act. The very fact that the Sub-Inspector was carrying out or purported to carry out the order of the District Superintendent of Police would bring him within the protection afforded by the Government of India Act read with the provisions contained in the Police Act. We must therefore hold that the finding of the learned Subordinate Judge in paragraph 29 of his judgment is erroneous and S. 53 of the Indian Police Act applies to the case so far as defendants 2 to 5 are concerned and the suit is therefore barred by limitation against them on this ground as well.

The last question to decide is whether the Province of Madras could be held liable for the acts of the other defendants. Relying on the cases such as those of *Limpus* v. *The London General Omnibus Co.*[1], *Poland* v. *John Par and Sons*[2] and *Bayley* v. *The Manchester Sheffield and Lincolnshire Railway Co.*[3], it was contended by learned counsel for the appellants that the Government would be, like any other master, responsible for the acts of its servants when they are done by them within the scope of their authority even if they happen to be against the express orders or instructions of the Government. In the present case, however, it was argued by Mr. Bhashyam, that there was no question of the defendants' and of at any rate Mr. Cameron's acting in

1. (1862) 1 H. & C. 526: 158 E.R. 993.
2. (1927) 1 K.B. 236.
3. (1872) 7 C.P. 415.

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contravention of the Government's orders. The duty of keeping the ex-Maharaja within the municipal limits of Kodaikanal was imposed on Mr. Cameron as the District Superintendent of Police and on the third defendant either directly or through Mr. Cameron and anything done or purported to be done by both of them within the scope of their authority would, if it amounts to a civil wrong, make the Government liable. It was further argued that the Government would be responsible for the negligence of its servants committed by them in complying with its express orders.

Had we been dealing with a private individual or his servants who were shown to have committed a civil injury in the course of their employment and for their master's benefit even if the act would have been against his specific instructions, he *i.e.*, the master, would have been liable. But the question now to decide is whether the Government could be made liable when the acts were done or purported to be done by certain Police Officers in discharge of their duties. The fact that the ex-Maharaja must be regarded to have been taken into or kept in custody under the orders of the Government of India is immaterial. He was interned by an order of the Government which was nothing but an act of state and which could not/be questioned by the municipal Courts of the country. Nor would his being in the custody of the defendants 2 and 3, even if that be assumed to be correct, make any difference if they were under a statutory duty to keep him in custody and entitled to arrest him if he in spite of being a detenu happened to transgress the municipal limits of Kodaikanal. That they were both empowered and bound to arrest him admits of no doubt, in our opinion. Had the ex-Maharaja left the municipal limits of Kodaikanal, he would have fallen within the mischief of S. 225-B, Indian Penal Code and would have been liable to be arrested by any Police Officer without a warrant. This was not because of any special request made either by the Government of India or the Government of Madras but because in his capacity as a Police Officer, it is his duty to arrest an offender without a warrant if he can in law do so and with a warrant when he has been ordered to do so by the authorities entitled to issue the same. The decision in *Tobin* v. *Queen*[1], is a clear authority for the proposition that a petition of right could not have been on the facts of the present case maintained against the Queen although in that case a Naval Officer had, purporting to act in pursuance of a statutory authority, wrongly seized a ship in the supposed performance of a duty imposed upon him by an act of Parliament. It was held in that case that on these facts, the maxim "respondeat superior" would not apply and make the Crown liable. The question how far the Government is liable for the acts of its servants when they are performed not in the carrying on of an ordinary business transaction which as successors of the East India Company it has at times to undertake, but in pursuance of the exercise of Governmental or sovereign power has been the subject of several decisions by the various High

1. 33 L.J.C.P. 199.

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Courts in India. It was held by Sir Lawrence Jenkins, Chief Justice of the Bombay High Court (as he then was) and another learned Judge in *Shiva Bajan Durgaprasad* v. *The Secretary of State for India*,[1] that the Government was not liable on account of the act of a chief constable who had seized certain bundles of hay not in obedience to an order of the executive Government but in performance of statutory power vested in him by the Legislature. To the same effect there are decisions of other Courts including our own where this question has been fully discussed (see *M. A. Kader Zailani* v. *The Secretary of State for India in Council*,[2] *A. M. Ross* v. *The Secretary of State for India in Council*,[3] *The Secretary of State for India in Council* v. *Garapati Somayya*[4] and *The Secretary of State for India in Council* v. *Shree Gobinda Choudhuri*.[5] It will be supererogatory on our part to tread the same ground once again. These authorities clearly establish that the Government could not be made liable if the act was done or purported to be done by the defendants in discharge of their duty imposed upon them by statute.

In determining the application of S. 270 (1) of the Government of India Act to defendants 2 to 5, we have already held that the acts done or purported to be done by these Police Officers were in execution of their duty. Mr. Cameron who telephoned to the Sub-Inspector for the ex-Maharaja to be detained at Kodaikanal Road Station was performing a statutory function and did not act because he was expressly authorised by the Government to detain the ex-Maharaja on that day. In the same way, the third defendant was bound to carry out the orders which were given or which he erroneously understood to have been given by his superior officer. The orders passed by the third defendant had to be obeyed by the defendants 4 and 5. Had the third defendant been found to have detained the first plaintiff not *bona fide* but on account of malice, the situation would have been different. Had these defendants been carrying out an order passed by the Government not in the exercise of its Governmental functions but in carrying on the ordinary business transactions, the position might have been also different. But in this case these considerations are out of place. The contention advanced by Mr. Bhashyam that these Police Officers were acting as agents to keep the ex-Maharaja in custody and not as Police Officers has absolutely no force. The direction of the Government of India contained in Ex. VII-C that they wanted a "watch to be maintained by the Police at any Railway Station where the detenu is likely to entrain and steps to be taken to ensure his rearrest in the event of his absconding" does not enable a Police Officer to do anything more than he was bound to do under the provisions of the Criminal Procedure Code or under the Police Act, irrespective of this direction having been given by the Government of

1. (1904) I.L.R. 28 Bom. 314.
2. (1931) I.L.R. 9 Rang. 375.
3. (1915) 29 M.L.J. 280: I.L.R. 39 Mad. 781.
4. (1926) 51 M.L.J. 446.
5. (1932) I.L.R. 59 Cal. 1289.

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India. The Government expects all officers to discharge the duties imposed upon them by statute and in this case the Government was not asking or expecting anything else or in addition to be done. In fact, the Government in passing this order was trying to minimise the rigour with which the movements of the ex-Maharaja could have been closely supervised. Paragraph 1 of this very letter indicates that the Government did not favour the employment of any special Police guard and clearly stated that they did not wish a close supervision over the ex-Maharaja of Nabha. That is why the special Police staff employed apparently by the local Government was ordered by the Government of India to be disbanded. We might also state in passing that if any act had been found to have been committed maliciously, it could not be held to have been done on behalf of the Government. Similarly, the detention of the first plaintiff being wholly wrongful and illegal and in excess of the Sub-Inspector's duty could not render the Government liable unless it was found to have been subsequently ratified or adopted by it. It was so held by their Lordships of the Judicial Committee in the *Collector of Masulipatam* v. *Cavaly Venkata Narainappah*[1], where they observed at page 554:

> "Again the acts of a Government Officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceeds that authority, when the Government in fact, or in law, directly or by implication, ratifies the excess".

The position is therefore reduced to this that the Government could not be held liable either when an officer takes an action in pursuance of a statutory duty or when the act committed by him happens to be in excess of his authority unless in the latter case the act is either done by the Government's express orders or is subsequently ratified and adopted by it. Nor could any action be maintained against the Government for a tort committed by its servants if in passing the order in the performance of which the tort was committed the Government was discharging its Governmental functions as a sovereign.

In view of our conclusion as regards all the defendants it is unnecessary to go very minutely into the question of damages. Having regard to the status of the plaintiffs and to the inconvenience to which they were put, the lower Court would have been inclined to pass a decree for a sum of Rs. 5,000 if it had held that any of the defendants could be made liable in this suit. We are, on the whole, satisfied that the view taken by the lower Court in regard to the quantum of damages was not, in the circumstances, erroneous or unreasonable.

For the above reasons the appeal fails against all the defendants and is dismissed. Having regard to the peculiar circumstances of the case, we consider that the lower Court's order in directing the parties to bear their own costs was fully justified and we would follow the same course ourselves.

The memorandum of cross-objections must therefore be dismissed but without costs.

1. (1860) 8 M.I.A. 500.

A portion of the argument in this case centred on the interpretation of the word 'duty' used in S. 270 sub-Cl. (1) of the Government of India Act. It was contended on behalf of the appellant that the word 'duty' could not include what was characterised by Mr. Bhashyam as 'purported duty' *i.e.* a duty which an officer may erroneously consider that he was required to perform. The learned Government Pleader however contended that the word 'duty' used in the section would also include a duty that an officer might think he was entitled or liable to discharge. We accepted the interpretation placed upon that word by Mr. Bhashyam but decided the point (in connection with which this interpretation was put) against him as we held the acts done by the defendants to be in discharge of duty and not of what was described as a 'purported' duty. Since this case involves a substantial question of law as to the interpretation of the Act within the meaning of S. 205 a certificate will issue to this effect.

Appeal and Memo. of cross-objections dismissed.

B.V.V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE HORWILL.

The Public Prosecutor .. *Appellant.**

v.

Poongavana Goundan .. *Respondent (Accused).*

Madras Prohibition Act (X of 1937), S. 4 (1) (a) and (g)—Offence under—Evidence—Accused manager of family owning hut—Articles of distillation recovered from hut—Liability to conviction.

A pot containing fermented wash, a bottle containing illicit distilled arrack and a number of vessels used for illicit distillation were found in a hut owned by the accused and his three younger brothers and in which he usually lived. The accused and his brothers also owned another house in the village, and the accused was admittedly not present when the articles of distillation were recovered.

Held, that as the accused was the manager of the family owning the hut in which the articles were recovered and was also living there he must be deemed to have had possession of the articles found and was liable to conviction under S. 4 (1) (*a*) and (*g*) of the Madras Prohibition Act.

Appeal under S. 417, Crl. P. C., 1898, against the acquittal of the aforesaid respondent (accused) by the Sub-Divisional First Class Magistrate of Dharmapuri in C.A. No. 43 of 1941 on his file (C. C. No. 147 of 1941 on the file of the Court of the Second Class Magistrate of Pennagaram).

The appellant in person.

K. S. Sundaram for Respondent.

JUDGMENT.—The accused in this case was convicted by the Stationary Sub-Magistrate of Pennagaram under S. 4 (1) (*a*) and (*g*) of the Madras Prohibition Act and sentenced to four months rigorous imprisonment. In appeal, the conviction and sentence were set aside on the ground that the prosecution had not satisfactorily proved that the accused was in possession. The Crown has preferred this appeal against the order of acquittal.

A pot containing 4½ gallons of fermented wash, a bottle containing four drams of illicit distilled arrack, and a number of

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*Crl. A. No. 686 of 1941. 26th November, 1941.

Public Prosecutor v. Poongavana Goundan.

vessels used for illicit distillation were found in a hut owned by the accused and his three younger brothers. The accused and his brothers also owned a house in the village. His brothers were tried and convicted; but the present accused has been tried since because he was then absconding. The Sub-Divisional Magistrate acquitted the accused on the ground that he had a house in the village and was admittedly not present when the articles of distillation were recovered.

It would appear from the evidence of P. W. 2, the village Magistrate of the village, and of D. W. 1, that not only is the accused the eldest member, and therefore the manager, of the undivided family consisting of himself and his three brothers and was the owner of the hut in which the articles were found; but that he also lived there. He was not present at the time when the search was made as he was then with his sheep in a pen at some distance off; but the evidence leads one to conclude that he lived in the hut as much as his brothers and was therefore in possession of the articles found in the hut, unless there is some reason to think that the articles recovered may have been introduced into the hut during his temporary absence. If the offence had been committed with regard to some smaller article such as a packet of opium or a jewel that could be easily introduced in a very short space of time without the knowledge of a person living in the house, then undoubtedly the Sub-Divisional Magistrate would have been right. But it is clear that all the paraphernalia of distillation could not have been introduced within a short space of time. It seems most unlikely that the younger brothers were waiting for their eldest brother to go out to attend to the sheep in order to introduce into the hut in his absence material for distillation and then to have the process well advanced by the time that the police came to search the hut. I have no doubt in the circumstances that the accused was in possession of the articles found and which were the subject of the charge. The order of acquittal is therefore set aside and the accused convicted and sentenced as he was by the Stationary Sub-Magistrate.

B. V. V. —— *Acquittal set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

PS. AR. AR. Arunachalam Chettiar by agent, Sivaraman Chettiar .. *Petitioner** (*Respt.-Plff.*)

v.

Govindaswami Goundan .. *Respondent* (*Petr. 1st Deft.*).

Arunachalam Chettiar v. Govindaswami Goundan.

Madras Agriculturists Relief Act (IV of 1938), S. 20—Scaling down petition presented to lower Court—High Court directing same to be proceeded with—Further action not taken owing to common mistake—Application for return of application—No orders passed—Subsequent application to proceed with earlier application—Maintainability.

During the pendency of an appeal in the High Court, Madras Act IV of 1938 came into force and an application was filed in the lower Court by the 1st defendant who was not contesting the appeal in the High Court to

*C. R. P. No. 2458 of 1939. 17th February, 1942.

Arunachalam Chettiar v. Govindaswami Goundan.

scale down the decree. Shortly after this application had been filed, the High Court gave judgment in the appeal deleting from the decree the clause which safeguarded the rights of certain defendants. At the time when judgment was pronounced it was represented that there was an application pending in the lower Court for relief under Act IV of 1938. The judgment therefore provided that the decree was to be "subject to the final orders that may be passed on the application so far as the amount due under the said mortgage was concerned". The applicant's vakil, however, acting under a mistake applied to the lower Court for return of the application. Subsequently on discovering the mistake he applied to the lower Court to proceed with the application.

Held, that the lower Court had the power under the circumstances to set right the consequences of the mistake by restoring the petition and going on with it from the point at which the proceedings were broken off at the earlier stage and the revived application could not be deemed to be a new application for computing the period of limitation under S. 20 of Madras Act IV of 1938.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Coimbatore, dated 26—6—1939 and made in E.A. No. 299 of 1939 in I.A. No. 1019 of 1938 in O.S. No. 148 of 1933.

A. C. Sampath Aiyangar for Petitioner.

C. D. Venkataraman for Respondent.

The Court delivered the following

JUDGMENT.—C. R. P. No. 2458 arises out of an order restoring an application filed under S. 19 of Act IV of 1938 and returned for presentation in a proper Court. The facts necessary to understand the matter are as follows. The decree in question was passed on a mortgage in favour of the plaintiff and the 11th defendant. Defendants 1 to 5 represented the mortgagors. Defendants 6 and 7 are the wives of defendants 1 and 2. The latter had paid off one of the co-mortgagees, the 11th defendant, but got him to transfer his interest to their wives, defendants 6 and 7. The lower Court's decree contained a clause safeguarding defendants 6 and 7 if they should in proper proceedings claim any equities as against the plaintiff. An appeal was taken against this part of the decree and also a minor correction was sought in another matter. While this appeal was pending, Act IV of 1938 came into force and an application was filed by the 1st defendant, who was not contesting the appeal in the High Court, to scale down the decree. Shortly after this application had been filed, the High Court gave judgment in the appeal deleting from the decree the clause which safeguarded the rights of defendants 6 and 7 and finding specifically that defendants 6 and 7 were mere name-lenders for the mortgagors, defendants 1 and 2. At the time when judgment was pronounced, it was represented to the learned Judges that there was an application pending in the lower Court for relief under Act IV of 1938. The learned Judges therefore provided in their judgment that their decree was to be "subject to the final orders that may be passed on that application so far as the amount due under the said mortgage is concerned." After this judgment was pronounced there was a series of misunderstandings in the lower Court. It appears to have been represented to the vakils appearing on both sides that the proceedings in the lower Court must stop as a consequence of the High Court's decree and must be conti-

Arunachalam Chettiar v. Govinda-swami Goundan.

nued in the High Court. The applicant's vakil took time to consider his position and then applied to the lower Court for the return of the application and the application was directed to be returned for presentation in a proper Court. It was not actually taken back and it lay in the Subordinate Judge's Court for nearly two months. Meanwhile the 1st defendant seems to have got a copy of the High Court's judgment, which presumably was not available previously, and to have discovered that the High Court had made its decree specifically subject to the decision of the pending application by the trial Court. He therefore filed the application E.A. No. 299 of 1939 explaining how the mistake had arisen and asking the lower Court to hear the original application, which was still in the Subordinate Judge's office, on the merits. The learned Subordinate Judge, on going into the matter, came to the conclusion that there was either a mutual mistake on the part of the lawyers on both sides or a mistake on the part of the applicant of which the respondent desired to take advantage and it was necessary to carry out the direction of the High Court's judgment and decide the application which was pending at the time when that judgment was pronounced.

It has been argued before us on various grounds that this decision is one which has to be modified in revision. The main contention is that the revived application must be deemed to have been presented for the first time on the date on which it was revived and that this date being more than sixty days after the passing of a stay order under S. 20 of the Act, the application was barred by limitation. We do not think that this contention can succeed nor does it seem to us that the question of limitation actually arises. If the revived application is to be regarded as a new application presented for the first time, that must be on the ground that the prior application had in substance been rejected. If it was rejected, no question of limitation would arise and of course the decree would necessarily have to be executed as it stands. If, however, the previous application was not rejected, but was merely in a state of suspense until it was revived, then quite clearly the application which was finally heard was the application originally presented within sixty days of the stay order and the proceedings connected with the abortive return will not alter that fact.

The only question therefore, which we have really to decide is whether the lower Court had power to revive this application in the circumstances of the case. If the Court did so revive it, it certainly cannot be deemed to have entertained a fresh application; nor would the reservation in the High Court's order have any relation to a fresh application filed after the High Court's judgment. We see no reason why the lower Court's order reviving this application should be set aside in revision. On the finding of the learned Subordinate Judge there was a clear error of fact which led the applicant to make a representation to the Court regarding the effect of the High Court's judgment and this misapprehension was apparently shared by the vakils on either side and by the Court when it passed the order returning the application for presentation in a proper Court. Had the appli-

cant known the true nature of High Court's order there would have been no question of asking for return; nor could the Subordinate Judge have returned the application for want of jurisdiction. Everybody seems to have been labouring under the same mistake and it seems to us that the Court had the power in the circumstances of this case to set right the consequences of this common mistake by restoring the petition and going on with it from the point at which the proceedings were broken off as a result of this erroneous impression regarding the High Court's order. We therefore do not consider it necessary or desirable to interfere with the order of the Subordinate Judge restoring the application that was directed to be returned.

The application, when restored, resulted in an amended decree which comes up for consideration in C. R. P. No. 1880 of 1940. When there is an amended decree, an appeal must be filed against that decree and no revision can be entertained. The same observation applies to C. R. P. No. 1881 of 1940 which is concerned with an order passed amending the same decree at the instance of the second defendant. There will be one week's adjournment for the petitioners to consider whether they wish to pay Court-fee on these two revision petitions and get them converted into appeals.

C. R. P. No. 2458 of 1939 is dismissed with costs.

B. V. V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

V. P. Kesava Menon .. *Petitioner** (*1st Deft.*).

v.

C. Achuthan Nair .. *Respondent* (*Plaintiff*).

Madras Agriculturists' Relief Act (IV of 1938), S. 14—Malabar tarwad —Tracing back of debts—Agriculturist executants—Earlier debt contracted for family—Whether can be taken into account.

When there is a family debt, renewed in various documents by different coparceners any member of the family liable for that debt may get the debt scaled down on the basis of the original liability by which he was bound as a member of the family throughout all the various renewals actually executed by the different coparceners. This principle is equally applicable to a debt contracted in a Malabar tarwad. Consequently when the personal liability of the executant members of the tarwad who are agriculturists is being scaled down under S. 14 of Madras Act IV of 1938 the executants are entitled to trace their liability back to earlier documents under which they were liable not as executants but as members of the family.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Ottapalam in S. C. S. No. 239 of 1938.

N. Gopala Menon and *V. Karunakara Menon* for Petitioner.

D. A. Krishna Variar for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition arises out of a decree on a promissory note executed by the 1st defendant as karnavan of a Malabar tarwad. The plaintiff sued the 1st defendant as the karnavan of the tarwad and all the defendants as members of the

*C. R. P. No. 734 of 1940. 19th December, 1941.

Kesava Menon v. Achuthan Nair.

tarwad liable as such for the family debt. The debt has a long history and it goes back to a series of transactions entered into by a previous karnavan on behalf of the tarwad. The 1st defendant has executed only the last two promissory notes, he not being the karnavan at the time of the earlier transactions. The lower Court has scaled down the debt with reference to the original principal of Rs. 400 advanced in 1923 as against the junior members of the tarwad to the extent of their interest in the tarwad properties. He has worked out the liability of the 1st defendant on a different basis, treating him as an individual who became liable for the debt for the first time when he signed the antecedent note Ex. B. of 1933. The debt as against the 1st defendant has been scaled down under S. 9 by reduction of the interest to 5 per cent.

No doubt this is a possible way of working out the consequences of the Act. But it is not the way which has commended itself to this High Court. In two cases *Doraikannu Odayar* v. *Veerasami Padayachi*,[1] and *Periakaruppan Chettiar* v. *Appaji Naidu*,[2] a Bench, of which I was a member, has indicated that when there is a family debt renewed in various documents by different coparceners, any member of the family liable for that debt may get the debt scaled down on the basis of the original liability by which he was bound as a member of the family throughout all the various renewals actually executed by different coparceners. In the many cases following these decisions, it has never been recognised that the liability of the coparcener who actually executes the note for a family debt is not to be traced back to earlier documents executed by other coparceners on behalf of the family.

It has been suggested that in a recent decision *Nalanunni* v. *Dakshayani Amma*,[3] where the Bench had to deal with the complications arising from the application of S. 14 of the Act to a Malabar tarwad, a different principle has been adopted. It seems to me that this is not the case. In that judgment the Bench came to the conclusion that for the purpose of S. 14 as applied to a Malabar tarwad, the Court had to divide up the family liability into two lots, one the liability of the agriculturist members and the other the liability of the non-agriculturist members and scale down the proportionate share of the debt due from the agriculturist members and make the non-agriculturist members jointly liable for their proportionate share of the unreduced family debt. And in dealing with this subject, the Bench points out that S. 14 is not concerned with any debt other than a family debt and that the personal liability of the executant members is not to be apportioned in the manner laid down under S. 14. In dealing with this subject, the judgment observes:

> "The operation of S. 14 will not affect the personal liability of the defendants who have actually executed this note. They will be entitled to scale down the decree so far as their personal liability is concerned, even as they would be entitled to scale down any other debt, not by rendering themselves liable for only a part of the debt but by being liable for the whole of the debt subject to such reduction as they may be entitled to if they are agriculturists."

1. (1940) 2 M.L.J. 651. 2. (1940) 2 M.L.J. 786.
3. Since reported in (1942) 1 M.L.J. 418.

Kesava Menon v. Achuthan Nair.

I can find nothing in this judgment to warrant the inference that when the personal liability of the executant members who are agriculturists is being scaled down as prescribed in this passage, those executant members would not be entitled to trace their liability back to earlier documents under which they were liable not as executants but as members of the debtor family.

In the result, therefore, I allow the Civil Revision Petition with costs and amend the decree of the lower Court so as to make the 1st defendant personally liable only for the amounts for which the decree has been passed against the tarwad with proportionate costs.

B.V.V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, CHIEF JUSTICE AND MR. JUSTICE BYERS.

Kathersa Rowther .. *Appellant** (*Appellant*)

v.

Abdul Rahim Sahib and others .. *Respondents* (*Respondents*).

Kathersa Rowther v. Abdul Rahim Sahib

Civil Procedure Code (V of 1908), O. 8, r. 6—Defendant pleading set-off—Omission by defendant to set up part of his claim—Effect—O. 2, r. 2—Applicability.

A defendant who pleads a set-off under O. 8, r. 6 of the Code of Civil Procedure is to be deemed to be a plaintiff within the meaning of O. 2, r. 2.

Order 8, r. 6 (2) requires the written statement put in by a defendant pleading a set-off to be such as to enable the Court to pronounce a final judgment both in respect of the plaintiff's claim and of the defendant's claim and the omission by the defendant to set up part of his claim makes him lose for ever his right to the part of the claim so omitted.

Nawbut Pattak v. *Mahesh Narayun Lal,* (1905) I.L.R. 32 Cal. 654, followed.

Appeal under Cl. 15 of the Letters Patent against the decree of the Honourable Mr. Justice Abdur Rahman in S.A. No. 226 of 1939 preferred against the decree of the District Court, Madura in A.S. No. 14 of 1938 (O.S. No. 28 of 1936, Sub-Court, Dindigul).

T. V. Muthukrishna Aiyar and *K. S. Ramamoorthy* for Appellant.

B. Somanatha Rao and *T. M. Krishnaswami Aiyar* for Respondents.

The Judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The question which arises here is whether the defendant who pleads a set-off under O. 8, r. 6, Civil Procedure Code, is to be deemed to be a plaintiff within the meaning of O. 2, r. 2 and consequently has to suffer the consequences of an omission. Although the point of law can be stated shortly, the facts of the case are somewhat complicated and it is necessary in order to appreciate the position to refer to them at some length.

Seeni Rowther, the father of the 1st and 2nd defendants, had four sons, the other two being named Mohammad Abdulla and Abdul Rahiman respectively. The father died on the 4th January, 1922, and in the following year the sons decided to partition the assets before discharging the debts due by the estate. Each of the bro-

*L.P.A. No. 12 of 1941. 2nd March, 1942.

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thers was allotted specific properties and he undertook to discharge specified debts. The terms of the partition were set out in a deed, dated 1st August, 1923. Each brother agreed that if he did not discharge the debts for which he undertook responsibility, any brother called upon to pay could claim against the defaulting brother a charge on the properties allotted to him. In O. S. No. 522 of 1915 of the Court of the Town Munsif of Madura, a money decree was obtained against the father. He failed to pay the decretal amount and when the sons partitioned the estate there was due under this decree a sum of Rs. 2,548 which the 1st defendant undertook to pay. In O.S. No. 105 of 1914 in the Court of the Subordinate Judge of Madura a mortgage decree had been passed against the father, and on the 1st August, 1923, the amount due to the decree-holder was a sum of Rs. 36,000. Under the terms of the partition the 1st defendant was required to pay Rs. 10,795 of this sum, the 2nd defendant Rs. 10,090, Mohammad Abdulla Rs. 13,495 and Abdul Rahiman, Rs. 1,620.

The 1st defendant failed to pay the amount due to the decree-holder in O.S. No. 522 of 1915. The result was that the decree-holder attached property which had been allocated in the partition to the 2nd defendant. On the 12th September, 1925, the attached property was sold and the purchaser obtained possession. The value of the property was Rs. 3,000. The 2nd defendant and Mohammad Abdulla failed to pay their shares of the decree obtained against the father in O.S. No. 105 of 1914 and in order to avoid a sale of the properties which had been allotted to the 1st defendant and Abdul Rahiman, they were compelled to pay what was outstanding. In this connection the 1st defendant had to expend Rs. 2,691-5-4.

In O.S. No. 26 of 1931 of the Court of the District Munsif of Palni the 1st defendant sued to recover from the 2nd defendant and Mohammad Abdulla the Rs. 2,691-5-4. The 2nd defendant pleaded that he was only responsible for Rs. 1,151-6-3 of this amount and that he was entitled to recover from the 1st defendant a sum in excess of the pecuniary jurisdiction of the Court, namely, in excess of Rs. 3,000, by reason of the default which the 1st defendant had made in paying the amount due to the decree-holder in O.S. No. 522 of 1915. By this plea of set-off he sought to defeat the 1st defendant's suit and at the same time leave himself free to bring a suit for any balance which might be due to him. The District Munsif held that the 2nd defendant was indebted to the plaintiff, the present 1st defendant, in the sum of Rs. 1151-6-3 as claimed by the 1st defendant, but that more than this sum was due by the 1st defendant to the 2nd defendant and on this basis he dismissed the suit. On appeal the learned Subordinate Judge, Dindigul, agreed with this decision, as did Abdur Rahman, J., on second appeal to this Court.

On the 13th November, 1935, the 2nd defendant assigned to the present appellant the balance of the amount owing to him by the 1st defendant, after giving credit for the Rs. 1,151-6-3. On the 2nd September, 1936, the appellant instituted in the Court of the Subordinate Judge of Dindigul the present suit to recover from the 1st de-

fendant the balance of his indebtedness to the 2nd defendant. The pleas raised by way of defence included the contention that the suit was barred by reason of the provisions of O. 2, r. 2, Civil Procedure Code and that all that the appellant had received was a mere assignment of a right to sue which meant that the suit could not be maintained. The Subordinate Judge held that the suit was not barred by reason of O. 2, r. 2, but he upheld the contention that the assignment was the assignment of a mere right to sue and therefore the suit was bad. On appeal the District Judge of Madura disagreed with the Subordinate Judge that there had been an assignment of a mere right to sue and also disagreed with him on the question of the applicability of O. 2, r. 2. The District Judge considered the provisions of that rule were fatal to the suit. The appellant then appealed to this Court and his appeal was heard by Abdur Rahman, J., who agreed with the District Judge that O. 2, r. 2 was a bar. The present appeal is from the judgment of Abdur Rahman, J., under Cl. 15 of the Letters Patent, the learned Judge having given the requisite certificate.

Order 8, r. 6 (1) states that where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand an ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as in the plaintiff's suit the defendant may present a written statement containing the particulars of the debt sought to be set-off. Sub-r. (2) says that this written statement shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off. Therefore the defendant who pleads a set-off is in the position of a plaintiff. Moreover his written statement has to be stamped according to the value of the relief he claims.

Order 2, r. 2 (1) says that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but he may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Sub-r. (2) says that when a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished. Sub-r. (3) states that when a person is entitled to more than one relief in respect of the same cause of action, he may sue for all or any relief, but if he omits any, except with the leave of the Court, he shall not be allowed to sue later for the relief omitted. This rule makes it quite clear that a cause of action cannot be split up although reliefs may be if the Court agrees. If the plaintiff omits part of the claim which he is entitled to make in respect of the cause of action, he has for ever lost his right to the part of the claim omitted.

The question whether the defendant who pleads a set-off is bound by O. 2, r. 2 was discussed by a Bench of the Calcutta High Court in *Nawbut Pattak* v. *Mahesh Narayun Lal*,[1] and it was held that

1. (1905) I.L.R. 32 Cal. 654.

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he was. The position was discussed at length by Mookerjee, J., whose judgment Abdur Rahman, J., accepted as embodying a correct statement of the law. We agree. Order 8, r. 6 (2) requires th written statement put in by a defendant pleading a set-off to be such as to enable the Court to pronounce a final judgment both in respect of the plaintiff's claim and of the defendant's claim.

On behalf of the appellant, Mr. T. V. Muthukrishna Iyer says that the District Munsif who tried O.S. No. 26 of 1931 was content to proceed with the case on the lines of the 2nd defendant's written statement and therefore, his client, who stands in the shoes of the 2nd defendant, should be allowed to adopt the case which was indicated in the written statement. It is manifest that the 2nd defendant ought not to have been allowed to rest his plea of set-off on the written statement which he filed. His claim against the 1st defendant was for Rs. 3,000 and interest from 12th September, 1925, which therefore was in excess of the jurisdiction of the District Munsif's Court. There were two courses open to the 2nd defendant when the 1st defendant sued him. He could either set up his own claim by way of set-off and confine it to the sum of Rs. 3,000, the limit of the pecuniary jurisdiction of the Court, or he could file a separate suit in the Court of the Subordinate Judge and ask the Subordinate Judge to transfer the 1st defendant's suit to his Court and try the two suits together. He adopted neither course and merely stamped his written statement to the value of Rs. 1,151-6-3. The fact that the 2nd defendant succeeded in persuading the District Munsif to dispose of the 1st defendant's suit on the lines indicated by the 2nd defendant, does not mean that he is now outside O. 2, r. 2. For the reasons given in *Nawbut Pattak* v. *Mahesh Narayun Lal,*[1] we consider that O. 2, r. 2 has application, and this means that the appellant cannot carry the matter further.

Before us, as before Abdur Rahman, J., the appellant laid great stress on the decision of Mathew, J., in *Webster* v. *Armstrong.*[2] That case had reference to the practice in County Courts in England in 1885 when there was no right of counter claim. The defendant could plead a set-off, but merely in bar of the suit. He could not ask for a decree in his favour for any balance that might be due. Abdur Rahman, J., considered that this case had no application and we again agree. The position is now very different in England because a defendant can bring a counter claim, and under the provisions of O. 19, r. 3 of the Rules of the Supreme Court, the Court has power to pronounce a final judgment in the same action both on the original and on the cross claim. We are bound by the provisions of the Civil Procedure Code and our reading of O. 8, r. 6 in conjunction with O. 2, r. 2 is that the appellant was precluded by the course taken by the 2nd defendant in the former suit from bringing this present action. Consequently the appeal fails and will be dismissed with costs of the 1st respondent.

We trust that this decision will see an end to litigation in connection with the estate of Seeni Rowther. It is now over twenty years since he died and the attitude adopted by the 1st and the 2nd

1. (1905) I.L.R. 32 Cal. 654.
2. 54 Law Journal Q.B.D. 236.

Kathersa Rowther *v.* Abdul Rahim Sahib. — Leach, C. J.

defendants with regard to their liability to pay their shares of the debts of the estate does not redound to their credit. The sons got possession of all the assets, but some of the creditors were kept out of their money for a long time. The present suit was instituted some six years ago and has been pressed in four Courts with the same result in each of them.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Umade Rajaha Raje Damara Kumara Venkatalingama Nayanim Bahadur Varu, Rajah of Kalahasti .. *Appellant** *(Plaintiff)*

v.

Panaganti Parthasarathy Rayanimgar and others .. *Respondents (Defts.).*

Rajah of Kalahasti *v.* Parthasarathy Rayanimgar.

Transfer of Property Act (IV of 1882), S. 101 (before the amendment of 1929)—Merger of rights of mortgagor and mortgagee—When extinguishes the mortgage—Holder of impartible estate—If absolute owner in whose hands there can be a merger.

Under the law as it stood before the amendment of the Transfer of Property Act in 1929, on a merger of rights of mortgagor and mortgagee in one person absolutely the mortgage will be extinguished, unless he declares expressly or by necessary implication that it shall continue to subsist, or such continuance would be for his benefit. Though in cases of merger ordinarily it is the holder of a charge or an incumbrance who acquires the equity of redemption subsequently, one can conceive of a case where a person may have acquired the equity of redemption by inheritance or otherwise first and subsequently come to be the holder of a charge or an incumbrance (*e.g.* when he inherits the property from two persons one of whom was the owner of the equity of redemption and the other the owner of the charge or incumbrance).

There is nothing in the language of S. 101 of the Transfer of Property Act (before the 1929 amendment) which would entitle a person who has acquired an absolute title to the property or happens to become a charge or incumbrance holder of the property of which he was the owner to plead the charge or incumbrance only by way of defence and not enforce the same against the puisne or the mesne encumbrancer as a plaintiff. The existence of another incumbrance is only one of the reasons which could have led a person who acquired an absolute title to the property or a charge or an incumbrance, as the case may be, to keep the charge or encumbrance alive and not the sole reason for its continuance. It cannot therefore be said that a mortgagee or an owner of an absolute estate can be held to have kept the previous charge alive only when there are intervening incumbrances in existence.

The contention that the owner of a charge or incumbrance must simultaneously with his succeeding to the equity of redemption declare his intention to keep the charge or incumbrance alive expressly or by necessary implication and if he fails to do that the liability must be held to be extinguished is not sound. It would be enough for him to do so within a reasonable time. The conveyance of the security to his wife benami for himeslf is a sufficient expression of the intention to keep it alive.

The amended S. 101 cannot be applied to a suit which was started two years prior to the amendment. It is impossible to hold that the other sections of the Transfer of Property Act were retrospective in character simply because some of the sections only were stated not to have any retrospective effect. Nor is the amending Act of 1929 purely declaratory.

*Appeal No. 496 of 1931. 16th August, 1940.

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No question of merger can arise in the case of a person who becomes entitled only to a qualified estate in the property, *e.g.*, the holder of an impartible estate after Madras Impartible Estates Act (II of 1904).

The mortgage could accordingly be enforced against the purchaser of the equity of redemption subject to the mortgage. The device of transferring his rights by a mortgagee for his own benefit to another person as his benamidar is not open to objection and has the effect of saving a merger if he happens to acquire the mortgagor's rights in the property subsequently—although the benamidar would have to hold any money recovered on the mortgage for the benefit of the mortgagor.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Nellore, dated 23rd March, 1931 and made in O.S. No. 10 of 1927.

P. Satyanarayana Rao and *D. R. Krishna Rao* for Appellant.

V. S. Narasimhachar, P. V. Rajamannar, K. Subba Rao, K. Kuppuswami, V. Subramaniam and *P. S. Raghavarama Sastri* for Respondents.

The Judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.—This appeal arises out of a suit instituted by the present Raja of Kalahasti (Venkatalingamma by name) on the basis of a mortgage deed executed by his father the late Rajah of Kalahasti (Timma Nayanim Varu) in favour of his second wife Chinnamma for a sum of Rs. 63,000 on the 2nd January, 1913—Ex. RR. The late Rajah of Kalahasti whom it will be more convenient to refer in this judgment as Timma, died on the 5th December, 1919, after he had held the impartible estate of Kalahasti for about 14 years. Timma had two sons by his first wife Chellamma one of whom is the present plaintiff and the other was Akkappa.

Akkappa was given in adoption by Timma to his elder brother Muddu Venkatappa who held the impartible estate of Kalahasti after the death of his father Venkatappa Nayanim Varu (commonly known as the C. S. I. Raja) up till the 22nd March, 1894. Muddu Venkatappa had, while he held the impartible estate, executed a mortgage in 1893 on some of the villages of his estate for a large sum of money in favour of a rich Hyderabad banker Raja Narasingh Girji. Muddu Venkatappa was succeeded by his adopted son Akkappa who, as stated above, was the natural son of Timma and remained in possession of the impartible estate of Kalahasti, between March, 1894 and May, 1905. It might be mentioned here that the estate being indebted to the extent of a sum of Rs. 33,48,879-1-6 was made over by Akkappa to the Court of Wards some time in 1900, but they relinquished their charge of the same on Akkappa's death or to be definite three months later. Since then the estate remained in Timma's possession up to the time of his death when it passed on to the present plaintiff. During his lifetime Timma seems to have been obliged to renew the mortgage in Raja Narsingh Girji's favour for an amount which had by then grown to be 6 lakhs but to this we will have to refer again.

Timma had a daughter Rangamma by his second wife Chinnamma. She was alive when Chinnamma died in 1919 and passed away in 1925 leaving behind her an adopted son Venkatarama, who is the 5th defendant in the present suit.

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Venkatappa Nayanimvaru (that is the C. S. I. Raja) executed a will on the 16th February, 1881 (Ex. A), in favour of his eldest son Muddu Venkatappa under which the whole of the estate of Kalahasti was bequeathed by the former to the latter although a charge was created in favour of his other sons for their maintenance. Timma and his son Venkatalingamma the present plaintiff instituted a suit (Ex. B) on the 17th March, 1890 (O.S. No. 12 of 1890), in the District Court of North Arcot for partition on the ground that Kalahasti was not impartible and that it could not be legitimately bequeathed by the C.S.I. Raja to his eldest son. To this suit Akkappa, who had already been given in adoption to Muddu Venkatappa, was impleaded as a defendant along with Timma's other brothers. This suit was compromised on the 1st August, 1892 (Ex. C), according to which the estate was conceded by all the parties to the suit to be impartible and the allowance fixed by C.S.I. Raja in his will for his sons was increased to some extent although certain villages which were allotted to Timma and his brothers under the will were agreed to be relinquished by them. This compromise was incorporated in a decree passed on the 30th March, 1893 (Ex. C-1). Muddu Venkatappa died on the 22nd March, 1894; but before his death objections were taken to certain clauses being embodied in the decree. The matter eventually came up to this Court and was decided by the judgment appearing in *Venkatappa Nayanim* v. *Thimma Nayanim*[1]. It was held in that appeal that the decree should not have embodied matters which did not form the subject-matter of that suit. This seems to have led to some differences between Timma and his natural son Akkappa, the holder of the impartible estate. Akkappa however executed a deed of mortgage in respect of maintenance due by him in favour of his natural father Timma on the 14th July, 1896, for a sum of Rs. One Lakh —Ex. M. This was followed by another agreement executed on the 14th October, 1896 (Ex. D), by which Akkappa undertook to raise Timma's maintenance from Rs. 600 the sum which he had agreed to pay in the compromise in O.S. No. 12 of 1890, to Rs. 650 per mensem from the 1st July, 1896. On the 30th August, 1898, Akkappa executed a registered promissory note in Timma's favour (Ex. G). On the 1st April, 1899, Akkappa executed a mortgage deed (Ex. F-1) for Rs. 50,000 in Timma's favour for amounts due to him under the promissory note Ex. G and for the balance which had still remained unpaid out of the decree in O.S. No. 12 of 1890. Akkappa was succeeded by his natural father Timma under the rule of primogeniture. Thus Timma became a representative of Akkappa—the person who had mortgaged the property with Timma—being already a mortgagee of some of the villages of the estate under Exs. M and F-1.

In the meantime an Act was passed by the local Legislature in regard to impartible estates. It was the Madras Impartible Estates Act (II of 1904) under which certain restrictions were placed on impartible estate holders in regard to the alienation of such estates. This was due to the fact that in several cases

1. (1894) I.L.R. 18 Mad. 410.

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that had gone up to the Privy Council, it was held that the impartible estate holders could devise or bequeath their estates in any manner that they liked without any restrictions while the prevention of such transfers was considered desirable on grounds of public policy. Be that as it may, the effect of the legislation passed in 1904 on the impartible estate holders was that they did not continue to be absolute owners of the property as they were before this legislation and could only deal with it in certain circumstances mentioned in the Act. It was after this legislation that Timma succeeded to the impartible estate of Kalahasti in 1905.

A creditor of Akkappa had instituted a suit O.S. No. 7 of 1899 in the District Court of Nellore for a sum of Rs. 5,89,415-9-0 which was decreed a couple of months later. This was a simple money debt. It was in execution of this decree that the equity of redemption of the villages belonging to the estate which were mortgaged with Raja Narasingh Girji and Timma was sold and purchased by defendants 1, 2 and the father of defendant 3. A suit for redemption (O.S. No. 1 of 1917) was instituted by them in the Court of the Subordinate Judge of Nellore against Raja Narasingh Girji and others. This was decreed by their Lordships of the Privy Council finally in 1924 (vide *Narasingh Girji* v. *Parthasaradhi Rayanim Garu*[1]). They however failed to pay the mortgage in Timma's favour.

Since the sale comprised the villages which were mortgaged by Akkappa in favour of Timma in 1899 under Ex. F-1 and since Timma had on account of his succession to the Kalahasti estate become subsequently a representative of Akkappa, he was advised to transfer the mortgage Ex. F-1 by way of gift in favour of his wife Chinnamma. This he did by the deed, dated the 19th August, 1912 (Ex. PP-1). As the sum of Rs. 50,000 for which Ex. F-1 was executed in 1899 had according to him come to be more than Rs. 1,13,600, Timma in his capacity of the holder of the impartible estate and hence as a mortgagor and in renewal of the mortgage Ex. F-1 executed a usufructuary mortgage in favour of his wife for Rs. 50,000 on the 2nd January, 1913 (Ex. QQ) and a simple mortgage on the same date for a sum of Rs. 63,600 (Ex. RR). The usufructuary mortgage has been paid off and has passed outside the pale of controversy—although the question whether the money was received by Timma or by Chinnamma Rao is still relevant in order to ascertain the legal effect of the other deed Ex. RR which had come into existence on the same date. The present suit was instituted in January, 1927, on the basis of the mortgage (Ex. RR) by Timma's son Venkatalingamma who is also the present holder of the impartible estate. It was dismissed in March, 1931, on a portion of one of the issues framed by the trial Court. The portion read as follows:—

"Whether the plaintiff is entitled to sue thereon (the mortgage deed, dated 2nd May, 1913), seeing that the plaintiff's father was himself the mortgagor".

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1. (1924) 47 M.L.J. 809: L.R. 51 I.A. 305: I.L.R. 47 Mad. 729 (P.C.).

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When the matter came up in appeal, a Division Bench of this Court, without going into the merits of that decision, preferred to have all the issues in the suit decided and remanded the suit for that purpose in January, 1938. The learned Subordinate Judge of Nellore has submitted his findings on the other issues as well and the whole appeal has been argued before us now.

Chinnamma's daughter Rangamma died as stated before in 1925. Venkatarama Nayanim Varu, the 5th defendant is her adopted son. The 1st defendant who is no other than the present Raja of Panagal made a settlement of his rights in the property on the 4th July, 1929, in favour of the 6th defendant who, while a minor, unfortunately died in England. His father, the 7th defendant, is his legal representative. The defendants who had purchased the equity of redemption in the Court sale (defendants 1—2 and father of defendant 3) mortgaged their rights with the Raja of Venkatagiri with the object of paying off Raja Narasingh Girji and redeeming the villages mortgaged with him. The Raja of Venkatagiri was the 4th defendant but he died *pendente lite* and his legal representatives are defendants 8 to 10. The dispute between these defendants and the plaintiff was compromised after the appeal was remanded for a decision on the remaining issues.

A number of objections have been raised on behalf of the defendants. It has been contended on behalf of the 1st defendant that since Timma, who was the original mortgagee, became the representative of the mortgagor Akkappa, his rights in the mortgage which he had taken from his son in 1899 under Ex. F-1 were, on his succession to the impartible estate, extinguished and there was no subsisting mortgage after that day. This contention has found favour with the Court below. Mr. Satyanarayana Rao, however, contends that in view of Timma's declarations both expressly and by necessary implication, his rights as a mortgagee continued to subsist and in any case, since their continuance was for his benefit, they could not be held to have been extinguished. It was further urged that at all events, after the Madras Impartible Estates Act, had come into existence in 1904, Timma could not be said to have been absolutely entitled to the impartible estate to which he succeeded only in 1905.

S. 101 of the Transfer of Property Act was amended in 1929 by Act XX of 1929. Since the present suit was instituted in 1927 and all the rights which have to be dealt with in this appeal arose even earlier, they would have to be determined in accordance with the law as it existed prior to the Amending Act —unless that Act was either retrospective in its operation or it remained unaffected by this new piece of legislation which was purely declaratory in character.

The first question to decide therefore is whether there was a merger within the meaning of that section (S. 101 of the Transfer of Property Act). The Transfer of Property Act is not exhaustive and does not in terms profess to be so. We would, therefore, be entitled to apply rules of English law as rules of justice, equity and good conscience only if we find that the

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present case is not covered by the Act as it existed in 1927. If, on the other hand, we find the present case to be covered by the Act as it existed on the relevant dates in this case it would have to be applied and if there was a difference between the Indian and the English law on that date, the English law would have to be disregarded by us in deciding this case. Before we examine the cases which have been cited by the learned counsel for the parties it seems to be preferable to have the provisions of the old S. 101 of the Transfer of Property Act before us. The section reads as follows:—

"Where the owner of a charge or other encumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or encumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit".

In construing the section, it would be our duty to adhere to the grammatical and ordinary sense of the words used therein and if the meaning of the words is found by us to be plain and unambiguous we would have to give effect to them regardless of any other consideration, and would not be justified in ignoring any part of the language of the section. Bearing these principles in mind let us now examine the language of the section and ascertain its meaning.

The first words which seem to be necessary to be borne in mind are "is or becomes". The word 'is' was apparently meant to convey the idea that a person who is absolutely entitled to the property may, on account of certain circumstances, subsequently become the owner of a charge or other encumbrance which was in existence on the date when he acquired the property. This might happen in various circumstances—the case which we are now called upon to decide being one of the illustrations of such instances. The words "or becomes" have apparently been used in contradistinction with the word "is". Either a person is absolutely entitled to a property on the date on which he becomes the owner of a charge or other encumbrance on that property or is already the owner of a charge or other encumbrance on immovable property before he becomes absolutely entitled to that property. The first case would be covered by the words "or becomes" and the second case by the word "is".

In this connection our attention was drawn by Mr. Narasimhachari to an Allahabad case reported in *Badan* v. *Murari Lal*[1]. The facts of that case were that one Badan mortgaged his property first to one Umrao Singh and then to Bhoop Singh. Umrao Singh brought a suit on his mortgage without impleading Bhoop Singh (the puisne mortgagee) and obtained a decree for sale which he transferred to the mortgagor's brother Bahal. The puisne mortgagee subsequently transferred his mortgage rights to the respondents in that appeal who obtained a decree for sale subject to the prior mortgage. Bahal died leaving Badan, the mortgagor, as his sole heir. The respondents applied for the execution of their decree and claimed to be entitled to bring the property to sale free from the prior mortgage. They contended

1. (1915) I.L.R. 37 All. 309.

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that when Bahal died, the benefit of the prior mortgage passed to Badan, the mortgagor, and since he was the owner of the property, the mortgagee's rights became merged and were extinguished. Badan, on the other hand, opposed this contention. The Court of first instance held against the merger. On appeal the lower appellate Court overruled the first Court's decision and found in favour of the merger. When the case came up before the High Court, the learned Judges were of opinion that the lower appellate Court was right and the first Court wrong. While deciding that case, the learned Judges expressed themselves in the following manner:

> "S. 101 of the Transfer of Property Act was referred to in the course of the arguments; but that section appears to apply only to the converse case of the owner of an encumbrance becoming the absolute owner of the property *though it is not easy to see why the words 'is or' were inserted in the section*".

Having failed to appreciate the meaning of the words "is or", the learned Judges continue to say:

> "There being no legislative provision on the question for decision, the case must be decided according to broad principles of equity and good conscience, with such assistance as may be afforded by the reported decisions of the Courts".

In our view, the assumption made by the learned Judges that there was no legislative provision on the question for decision, was unjustified. Had the learned Judges tried to appreciate the meaning of the word 'is' as it appears in the context, we have no doubt that they would have seen that S. 101 was in terms applicable to the facts of the case which they were called upon to decide. Unless we hold that the word 'is' was redundant and this we cannot do on the well-recognised principles of interpretation, it would be impossible to agree with the reasoning of the learned Judges in this decision. The plain object of the Legislature in placing the word 'is' was obviously to provide for one of the contingencies to which we have referred a little while ago. It is true that ordinarily it is the holder of a charge or an encumbrance who acquires the equity of redemption subsequently—but we can well conceive of a case where a person may have acquired the equity of redemption by inheritance or otherwise first and subsequently come to be the holder of a charge or an encumbrance, *e.g.*, when he inherits the property from two persons one of whom was the owner of the equity of redemption and the other the owner of a charge or an incumbrance. We are thus not satisfied, and say so with considerable deference, that the case in *Badan* v. *Murari Lal*[1], was correctly decided.

To resume the construction of S. 101. The next words which call for our attention are those which begin with the word 'unless'. Having laid down the general rule of law in regard to cases where a charge or encumbrance shall be extinguished, the legislature added two provisos or exceptions, the first being that when the owner of a charge or other encumbrance or immovable property, as the case may be, became absolutely entitled to the property or came to own the charge or encumbrance, the charge or encumbrance was extinguished unless he declared "by express

1. (1915) I.L.R. 37 All. 309.

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words or necessary implication that it 'would' continue to subsist". If he did so declare, the rule laid down by the section was that the charge or encumbrance was not extinguished. The second proviso or exception went even further. Even if such a person did not declare either by express words or necessary implication but if the Court found that the continuance of the charge or encumbrance would be for a person's benefit, it was required to presume, in accordance with the natural presumption, that a person would not have acted or intended to act against his benefit and that he must have intended to keep the charge or encumbrance alive and not to permit it to be merged with the ownership of the property. This was held by a Division Bench of the Calcutta High Court in *Sonaulla Karikar* v. *Abu Sayad Mahammad Ismail*,[1] and we are inclined, with respect, to agree with that decision and not with certain observations which are to be found in *Bai Rewa* v. *Vali Md. Miah Md.*[2] The same view appears to have been taken by Dr. Rash Behari Ghose in his well-known work on the Law of Mortgages at page 524, Vol. I (5th Edn.).

In this particular case, Timma was the owner of a charge or encumbrance before he became a representative of the mortgagor and became entitled to the property. Leaving the question whether he became absolutely entitled to the property or not for the time being out of consideration in view of Act II of 1904, we will have to determine, on the language of the section, whether the continuance of the charge or mortgage was for Timma's benefit or whether he made any declaration either by express words or necessary implication that the charge or encumbrance which he had acquired in 1899 continued to subsist in 1905 when he became the representative of his natural son Akkappa the mortgagor.

It has been argued by the learned counsel for the respondent that S. 101 has, in the absence of any intervening encumbrances, no application. In other words, the contention is that the doctrine of merger must be held to come into operation in every case when the owner of a property or encumbrance happens to become the owner of the encumbrance or property unless an intervening encumbrance had been created in the meantime, *i.e.*, between the time when he was the owner of the property or encumbrance and the date on which he subsequently acquired the encumbrance or the property. There is nothing in the language of S. 101 of the Transfer of Property Act which would justify us in imposing a condition which is not to be found in the section itself unless it be that some other principle of law is attracted which renders it incumbent upon us to read something more in the section; but if as we have said before, the case falls within the ambit of that section and no other principle of law is found which has to be super-imposed on the provisions contained in the section, it would be impossible for us to go to English or to any other system of law to find what the Indian law on the subject is. We would have in that case to be governed by the statute law in force in this country in preference to any other law and apply it regardless of the principles that are being acted upon elsewhere.

1. (1929) I.L.R. 57 Cal. 473.
2. (1922) I.L.R. 46 Bom. 1009.

A number of rulings were cited on behalf of the parties in this connection and since, as we have said before, there is nothing in the words of S. 101 of the Transfer of Property Act itself, it would be better to examine the decisions with the object of ascertaining if it is essential for us to introduce any other principle and read the provisions of the section subject to that principle.

The first case on which great stress was laid by the learned counsel for the respondent was that of *Bhavani Kuwar* v. *Mathura Prasad Singh*[1]. The facts of that case briefly were that a mortgagee brought a suit on the basis of his mortgage deed and purchased the mortgaged property himself on the 19th March, 1900, in execution of his decree. Nine days later a charge for arrears of land revenue arose and the land was sold by the Collector. The revenue sale purchaser sued to recover possession and the mortgagee set up his mortgage as a defence. This contention, although it found favour with the Courts in India, was overruled by their Lordships of the Privy Council, who held that the mortgage was extinguished by merger. One of the reasons given by their Lordships in their judgment was that there were no interests of *any kind* existing on the 19th March, the crucial date in question, which could enter into account or be taken into consideration so as to impede the full and complete ownership of the estate as such. They also adverted to the fact that the whole property, and not merely the equity of redemption, was put for sale by the Court in execution of the mortgage decree and purchased by the decree-holder and that even if a stranger other than the mortgagee had purchased the property his position would have been the same as that of the mortgagee purchaser. Mr. Narasimhachar however drew our attention to their Lordships' observation appearing at page 103, which reads as follows:

"And it would seem to follow as a necessary consequence that when the mortgagee thus became the purchaser and owner of the subjects mortgaged, he was not in a position to maintain *as against himself, or as against third parties unconnected with mortgage transactions upon the property,* the position that his mortgage still remained an incumbrance thereon."

Emphasis was laid by the learned counsel for the respondent on the underlined words and he urged that their Lordships intended to lay down that if a mortgagee became a purchaser and owner of the subjects mortgaged—such as Timma was after he had succeeded to the impartible estate—he or the plaintiff who is no other than Timma's legal representative would not be able to maintain as against third parties—such as his client who happens to be a stranger purchaser of the property is—the position that Timma's mortgage still remained alive and did not merge in the equity of redemption. We do not understand their Lordships to mean anything of that kind. They were not intending to lay down the whole of the law in that sentence but were merely confining their attention to the usual type of cases in which a merger ordinarily takes place. This would be clear when we

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1. (1912) 23 M.L.J. 311: L.R. 39 I.A. 228: I.L.R. 40 Cal. 89 (P.C.).

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find that towards the close of the very next paragraph they expressed themselves as follows:

"On the 19th March, 1900, the crucial date in question there were no interests of *any* kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such".

If Mr. Narasimhachar's contention be correct, why did their Lordships use the expression 'interests of any kind'. It would be futile to contend that this expression was loosely used by their Lordships in the judgment or that they were meaning to refer to mesne incumbrances alone when they used these words. In the present case, there are interests of one kind which have to enter into account or to be taken into consideration. We have already pointed out that when Akkappa died, the Kalahasti estate was very heavily encumbered. It was therefore only natural or, would in any case be, beneficial, for Timma to keep the mortgages which he had taken from Akkappa during the time that the latter was the holder of the impartible estate, distinct and separate.

It might be mentioned here that in order to advance his argument Mr. Narasimhachar urged that Timma's personal property became liable for the debts due by Akkappa although his liability, he conceded, had to be limited to the extent of the estate received by the former from the latter. He argued that the decree was not against the estate of Akkappa but to the extent of the estate of Akkappa in his, *i.e.*, Timma's hands and this meant that even his personal property was liable to discharge the debts although to the extent of the estate received by him from Akkappa. The contention, was so unreasonable and would have led to such startling results that it would have been impossible for us to accept it, even if S. 52 of the Code of Civil Procedure had not been fortunately as explicit in this respect as it is. But a perusal of that section leaves no room for doubt that the contention is entirely wrong and it is the duty of the decree-holder to proceed against the estate of the deceased first and only when no such property remained in his legal representative's possession that the decree-holder is entitled to request the Court to proceed against the legal representative's property and this also after he, *i.e.*, the legal representative, fails to satisfy the Court that he had duly applied such property of the deceased as was proved to have come into his possession.

The next case in the chronological order on which stress was laid by the learned counsel for the respondent was that of *Arumughasundara Maharaja Pillay* v. *Narasimha Aiyar*.[1] Where a Division Bench of this Court held that if a mortgagee purchased the equity of redemption, the mortgage or encumbrance would be merged in the subsequent purchase in the absence of any mesne encumbrances on the property. The facts of that case are given fairly clearly in the head note to that decision which reads as follows:

"*A* mortgaged his property to *M* who assigned his mortgage right to *B's* father in 1892. In 1897 *B's* father obtained a fresh mortgage from *A*

1. (1915) 29 M.L.J. 583.

for the amount due on the mortgage of 1892. On his father's death, B succeeded to his mortgage right. In 1899 B purchased A's equity of redemption in the mortgaged property. In 1905 B sold the same property to A purporting to reserve his rights under the mortgages in favour of his father. Subsequently B instituted a suit on foot of the mortgages reserved in the conveyance of 1905''.

From the facts, it would be seen that at the time when the equity of redemption of the morgaged property was purchased by B in 1899, there were no encumbrances and no reasons of any other kind which could have led him to declare either by express words or necessary implication that the mortgagee's rights which had devolved on him from his father would continue to subsist separately from the equity of redemption subsequently purchased by him or that such continuance would have been for his benefit. Since the relevant point of time which we have to bear in mind in order to ascertain whether the charge or encumbrance was extinguished or not is that of the subsequent acquisition by the prior holder of a charge or an encumbrance or of absolute title to the property, it would be immaterial to consider the subsequent circumstances which might have led him to act differently. It is on that date that the Court would have to ascertain whether there was a merger or to use the words of the section 'an extinction of liability under the charge or incumbrance' and this could only mean whether there was any declaration express or implied by him or whether it was beneficial for him to keep his subsequently acquired rights separately and not permit them to be merged in his rights of which he was already the owner on the date of his subsequent acquisition. If we bore those considerations in mind, we would have to respectfully agree with the decision of the Division Bench of this Court that there was a merger of the mortgagee's rights, which had devolved on B on his father's death, with the equity of redemption which he had purchased in 1899. This is because there were no circumstances existing on that date which could have possibly led the purchaser of the equity of redemption in 1899 to keep the mortgagee's rights unextinguished and once they were merged and the purchaser of the equity of redemption became the complete owner of the property, it would not have been possible for him later on to separate the mortgagee's rights which his father had acquired in 1892 or 1897 and alienate the equity of redemption alone which he, *i.e.*, B had purchased in 1899. We have, therefore, absolutely no hesitation in coming to the conclusion that the decision of that case was unassailable. But in concurring with the judgment delivered by Sir John Wallis, C.J., as he then was, Mr. Justice Seshagiri Aiyar, observed that he understood the decision in *Bavani Kuwar* v. *Mathura Prasad Singh*[1], to lay down that when there were no encumbrances, there would be an extinguishment of the rights under the mortgage when the equity of redemption was acquired. While interpreting S. 101 of the Transfer of Property Act he observed at page 594 as follows:

1. (1912) 23 M.L.J. 311: L.R. 39 I.A. 228: I.L.R. 40 Cal. 89 (P.C.).

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"It is clear that section contemplates the existence of *puisne incumbrances.* Unless that be the object, the clause relating to the subsistence of the encumbrance being for the benefit of the purchaser can have no meaning. The person who becomes absolutely entitled to the property cannot reserve in his favour and as against himself his own mortgage: As I read the section it leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption the encumbrance in his favour is extinguished. It only enacts that where there are other mortgages on the property an intention will be imputed to the mortgagee purchaser that he intended to keep alive his own mortgage as a protection against subsequent claimants. The discussion in the House of Lords in the case already referred to shows that the rule enabling the purchaser to fall back on his mortgage is an infringement of legal rights. Consequently a strict construction should be placed on this provision of law. I am of opinion that the mortgagee purchaser can use his previous mortgage only as a shield if there are mesne encumbrances, and that also only in respect of the properties which are covered by such encumbrances".

With very great deference to the learned Judge, we cannot agree to most of these observations. There is nothing in S. 101 of the Transfer of Property Act itself which provides for the existence of puisne encumbrances. That is why the learned Judge uses the word 'contemplates' in the first sentence quoted above. The reason for this conclusion is given by him in the next two sentences. The provisos or exceptions which have been added to the section lay down clearly when may a person 'reserve in his favour and as against himself his own mortgage' and when that encumbrance would not be extinguished. It cannot be denied that the existence of puisne encumbrances may be one such consideration: but to say that it is the only consideration does not seem to us to be justified. There may be other reasons for instance, such as those existing in the present case which may lead a previous mortgagee to keep his mortgage rights unextinguished or which may lead the Court to hold that the continuance of his previously acquired rights was for his benefit. In fact as we read the section we are of opinion that if a purchaser makes a declaration, either express or implied that he would keep his subsequently acquired rights as subsisting and not allow them to be merged, it would be unnecessary to find whether such subsistence was to his benefit or not so. Under the section he is the sole arbiter of his destinies and it seems to be impossible to substitute any other person's will for his. Then the learned Judge adverted to the general rule of law that when a mortgagee purchases the equity of redemption, the encumbrance in his favour would be extinguished. By the general rule of law, we suppose he means the general rule of common law of England. So far as the Indian law is concerned, S. 101 codifies the law of merger and it cannot be denied that it is exhaustive so far as it goes. If a mortgagee who purchased the equity of redemption happened to fall within the ambit of this section, there seems to be no justification for us to go to the common law of England. Moreover there are instances where a person may occupy a dual or a double capacity but these do not seem to have been considered by the learned Judge. We will discuss this question in some detail a little later when we examine Mr. Narasimhachariar's arguments which were advanced in connection with cases where debts were held to have been extinguished by the coalescence of the rights

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of creditors and the duties of debtors in the same persons. The learned Judge then goes on to say that S. 101 only enacts that when there are other mortgages on the property, an intention will be imputed to the mortgagee purchaser that he intended to keep his own mortgage alive. We are afraid we do not find anything in S. 101, which will lead us to limit the application of that section to those cases only where there are other mortgages on the property. Then there is nothing in the section that the mortgagee purchaser can use his previous mortgage only as a shield and cannot use his previous mortgage which has not been extinguished under S. 101, as a spear or by way of an attack. In coming to that decision the learned Judge referred to an old decision of this Court in *Ramu Naicken* v. *Subbaraya Mudali*[1], where it was held that the mortgage right could only be used as a shield against puisne encumbrances. We find nothing in S. 101 which would entitle a person who has acquired an absolute title to the property or happens to become a charge or an incumbrance holder of the property of which he was the owner to plead the charge or incumbrance only by way of defence and not to enforce the same against the puisne or the mesne encumbrancers as a plaintiff. See in this connection cases reported in *Polayya Dora* v. *Anantha Patro*[2] and *Arumugha Bathan* v. *Semba Goundan*[3].

The third case to which our attention was drawn was that of *Raja of Kalahasti* v. *Sree Mahant Prayag Dossjee Varu.*[4] It is interesting to observe that this was the appeal which was brought by Timma himself. It is true that it was held in that case that where a mortgagee became also entitled by inheritance to the equity of redemption, his rights under the mortgage would be, unless there were puisne encumbrancers against whom he was to be protected, extinguished. But this judgment simply follows the observations by Seshagiri Aiyar, J., in *Arumughasundara Maharaja Pillai* v. *Narasimha Aiyar*[5] and advances the position no further.

Two more cases of Lahore were cited during the course of his argument by the learned counsel for the respondent. The first one was that of *Gobind Sarup* v. *Kuldeep Singh*[6], where it was held by a Division Bench of that Court that part II of S. 101 of the Transfer of Property Act would not apply where no intervening encumbrances existed and where a merger of a lesser estate takes place in a greater estate as distinguished from the merger of a lower in a higher security. We have already referred to S. 101 in some detail in an earlier portion of this judgment and it is unnecessary for us to repeat the reasons that have led us to hold that the last portion of S. 101 could not be necessarily confined to those cases alone where there were intervening encumbrances. No reasons have been given by the learned Judges for coming to a contrary decision and we have, to some extent,

1. (1873) 7 M.H.C.R. 229.
2. (1935) 69 M.L.J. 903: I.L.R. 59 Mad. 44.
3. (1936) 70 M.L.J. 719: I.L.R. 59 Mad. 1042.
4. (1916) 30 M.L.J. 391.
5. (1915) 29 M.L.J. 583.
6. A.I.R. 1924 Lah. 377.

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discussed the cases on which their opinion was based. The only case to which we have not made any reference so far was that of *Mohesh Lal* v. *Mohant Bawan Das*[1], where it was held by the Judicial Committee that the question whether a mortgage which was paid off was kept alive or was extinguished depended upon the intention of the parties and the mere fact that it had been paid off could not decide the question whether it was or was not extinguished. In coming to that decision, their Lordships had referred to *Adams* v. *Angell*[2], where it was held that the question "whether a mortgage which was paid off was kept alive or extinguished depended on the intention of the parties" and since in that case no intention to the contrary was expressed or could be deduced, it was held that the person who made the payment and claimed to be the owner of the estate must be taken to have intended that the money was to be applied in extinguishing the charge. While stating the rule on the subject their Lordships referred to the following observations made by the Master of the Rolls in that case:

> "In a Court of equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If it is paid off by a tenant for life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance; for, although he has not declared his intention of keeping it alive, it is presumed that his intention was to do so, because it is manifestly for his benefit. On the other hand, when the owner of an estate, in fee, or in tail, pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it".

This would show as we have ventured to point out before, that the existence of another incumbrance was only one of the reasons which could have led a person who acquired an absolute title to the property or a charge or an incumbrance as the case may be, to keep the charge or encumbrance alive and not the sole reason for its continuance. This case cannot thus be said to be an authority for the proposition that a mortgagee or an owner of an absolute estate can be held to have kept the previous charge alive only when there are intervening incumbrances in existence. It is unnecessary in the present case to go into the second reason given by the learned Judges of the Lahore High Court to hold that S. 101 was not applicable. We refer to what was observed by them in regard to the merger of a lesser estate taking place in a greater estate as distinguished from a merger of a lower in a higher security. They were apparently adverting to a distinction between what they called an estate and security.

The other Lahore case was that of *Lala Lakhmi Chand* v. *Bhai Santokh Singh*[3], where the following observations were made by the learned Judges:

> "If there is a mesne mortgagee, then it is conceivable that the prior mortgagee who acquires full proprietary rights may keep alive his prior mortgage and use it as a shield, if occasion arises. In the present case, there was no occasion whatsoever for the mortgagee joint family represented

1. (1883) L.R. 10 I.A. 62: I.L.R. 9 Cal. 961 (P.C.).
2. (1877) L.R. 5 Ch.D. 634.
3. (1930) 12 Lah.L.J. 56.

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by Pratap Singh to keep alive the three mortgages. It was a straight dealing between the mortgagee on the one side and the mortgagor on the other, whereby the mortgagee obtained the sale deed of the equity of redemption from the mortgagor and thus acquired full ownership, the result of the transaction being the confluence of the interests of the mortgagor and the purchaser of the equity of redemption. Thus, the doctrine of merger fully came into operation''.

With great deference to the learned Judges who decided that case, we do not find ourselves in agreement with the proposition as enunciated by them. According to the learned Judges, it is only when a mesne mortgage existed that it would be possible for a prior mortgagee of a property who acquired full proprietary rights in that property to keep his prior mortgage alive and that also by using them merely as a shield and not by way of attack. This, we have already tried to show, cannot be legitimately inferred either from the words of the section which we are called upon to construe or from the cases decided by their Lordships of the Privy Council to which reference has already been made. According to the learned Judges, in a straight dealing between the mortgagee on the one side and the mortgagor on the other, it is not possible for the mortgagee to keep his mortgage alive and distinct from the equity of redemption which he acquires subsequently. We cannot, with great respect, assent to that statement in the way in which it was stated. It would be so however if there was no reason for the mortgagee to keep his mortgage alive at the time when he acquired the equity of redemption or in other words when the keeping of these two rights separately was not to his advantage or when there was no express or implied declaration by him to that effect.

Our attention was then drawn by the learned counsel for the respondent to another decision of their Lordships in *Malireddi Ayyareddi* v. *Gopalakrishnayya*[1], in which their Lordships observed that where there were several mortgages on a property, the owner of the property might by paying off his earlier charge treat himself as buying it and standing in the same position as that of his vendor or, to put it in another way, he may keep the encumbrance alive for his benefit and thus come in before a later mortgagee. This is not different from what we have understood the rule to be but learned counsel obviously wished to rely on the exception stated by their Lordships that this rule would not apply if the owner of the property had covenanted to pay the later mortgage debt. This limitation was mentioned by their Lordships for the obvious reason that if a person was under a liability to pay, he must be, when paying his debt, held to have discharged his own liability and as it would thus follow as a necessary conclusion that the security which depended upon the existence of the debt was extinguished as soon as the debt itself was paid off and ceased to exist. This is however a different matter and has nothing to do with the case which we are now called upon to decide. Here Timma had never agreed to become personally liable for the debts incurred by his predecessor, Akkappa and the

1. (1923) 46 M.L.J. 164: L.R. 51 I.A. 140: I.L.R. 47 Mad. 190 (P.C.).

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case could not therefore fall within the exception enunciated by their Lordships of the Judicial Committee. It might be however useful that even in this decision *Malireddi Ayyareddi* v. *Gopalakrishnayya*[1], their Lordships observed as follows:

> "It is further to be presumed, and indeed the Transfer of Property Act, S. 101, so enacts, that if there is no indication to the contrary the owner has intended to keep alive the previous charge if it would be for his benefit".

This, in our opinion, clinches the matter and puts an end to the contention raised by Mr. Narasimhachar. It is true that there is an observation in the Law of Mortgages by Dr. Ghose that:

> "A merger can take place only when a security comes into immediate contact, so to speak, with the ownership, or in other words, when they unite without any outstanding interest in a third person".

But we believe that the learned author was contemplating the ordinary case where a puisne mortgagee acquires an absolute interest subsequently and happens to find no intervening encumbrances existing at the time.

It was, however, urged that since Akkappa was liable to pay the debt and if he had paid the debt, the security would have been extinguished, his heir and legal representative Timma should similarly be, as being so to say a continuation of Akkappa's person, held liable to pay and if he paid or otherwise became the owner of the mortgagee's rights, the debt should be held to have been paid and the security extinguished. This is really the same argument put in other words to which reference has already been made. An heir is not personally liable for the debts of the person of whom he is the representative and there is no warrant for the statement that Timma had made any covenant that he would be personally liable to pay the debts of the person to whose rights he had succeeded.

On behalf of the appellant Mr. Satyanarayana Rao referred to several cases, two of which *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*[2] and *Mahalakshmi* v. *Somaraju*[3], were cited to show that the existence of mesne encumbrances was not the only reason which could prevent merger from taking effect. Both of these were cases where property was found to have been mortgaged at the time when it was attached and the subsequent mortgage in one case or sale in the other were effected by the mortgagors with the object of paying off the prior incumbrances. After the prior incumbrances were paid off—the persons who had paid these amounts, when faced with the attachments effected on the property before the dates of their payments but after the dates on which prior incumbrances were created, claimed to be subrogated to the rights of prior charge holders and urged that the mortgagor's liabilities under the prior encumbrances were not extinguished. It was held that the intention of the parties in the circumstances was that the earlier morgages when paid off should not be extinguished but kept alive for the benefit of the charge

1. (1923) 46 M.L.J. 164: L.R. 51 I.A. 140: I.L.R. 47 Mad. 190 (P.C.).
2. (1901) I.L.R. 29 Cal. 154.
3. (1939) 2 M.L.J. 72: I.L.R. (1939) Mad. 600.

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holders who had paid for the encumbrances created before the attachment, although actually paid after the attachment had been effected. The decisions might have been, if we were otherwise satisfied as to the soundness of the contention put forward by Mr. Narasimhachar, capable of being distinguished on the ground that the rights created by the attachments were very similar to those created by mesne incumbrances and had to be governed by the same principle. These cases cannot thus support the appellant's contention. The third case referred to us was that of *Dulhin Lacchambati Kumari* v. *Bodh Nath Tiwari*[1]. The facts of this case were that one Mathura Nath Ghosh who was a proprietor of a Mauza granted a Mukarrari lease respecting Jadua patti in favour of two persons *D* and *N* of a Tewari family. Sometime later the proprietor of the Mauza granted a patni lease of the whole Mauza to two other persons *T* and *K* of the same Tewari family. Shortly after this *T* sold his share of the patni lease to *K*. It was contended in this case that *D* and *N* who had acquired the Mukarrari lease of the patti in the first instance and *T* and *K* who took the patni lease of the whole Mauza later were members of a joint family and inasmuch as these rights were acquired by members of the same family, they should be held to have merged. It was denied that *D* and *N* on the one hand and *T* and *K* on the other were members of a joint Hindu family. In holding that there was no merger their Lordships of the Judicial Committee assumed for the sake of argument that these persons were members of a joint family and observed as follows:

"But, if the doctrine of merger is appealed to, that doctrine must be taken as it stands. Merger is not a thing which occurs *ipso jure* upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. There may be many reasons—conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others—in the course of which the expediency of avoiding the coalescence of interest and preserving the separation of title may be apparent. In short, the question to be settled in the application of the doctrine is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain? This is in accord with settled law, of which two recent instances may be given—namely *Capital and Counties Bank* v. *Rhodes*[2], and especially the judgment of Farwell, J., in *Ingle* v. *Jenkins*[3].

"The doctrine of merger being thus applied to the present case, it is found on an examination of the circumstances, that they show with great clearness that instead of the *mukarrari* lease having been extinguished by merger, it was, on the contrary kept up as upon the one hand the source of right to the cultivators proceeding from the *mukarraridars*, and upon the other hand, the separate grant of subsisting right to the *mukarraridars* by their lease in respect of which the payment into the patni exchequer of the specific Rs. 66, specified in the *mukarrari* lease, continued to be made. The argument of Mr. Kenworthy Brown upon the documents made this clear. It is not, however, necessary to enter upon the details thereof, for both of the Courts in India, after full investigation, are satisfied in that particular. Had there been a true merger in fact, and in intention, the whole of such transactions would, in all probability, have taken a different shape, and in particular no more would have been heard of the *mukarrari* rent.

1. A.I.R. 1922 P.C. 94: L.R. 48 I.A. 485 (P.C.).
2. (1903) 1 Ch.D. 631.
3. (1900) 2 Ch. D. 368.

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"This raises the last question in the case, and it is one of some importance. It was strongly argued by the appellants' counsel that it was sufficient for his purpose to show that *mukarraridars* and *patnidar* were of the same joint family, and that the difference of name of the one set of persons from the other person was of no account.

"Their Lordships are not of this opinion. The difference of name, it is not going too far to say, may be at least an element, and an important element, in the question whether merger was ever truly intended. There may, under the law of England, be complete fundamental identity of right between the holder under one title, and the holder under another, but a convenient method of indicating intention on the subject is to create, for the purpose of keeping up the separation of title, a trust by which merger in the legal sense is clearly avoided. In short, although the same person is truly and comprehensively the owner of all the rights which might have coalesced, the substance of separation is preserved by the form of title not having been allowed to merge into the one name.

"To apply this doctrine to the Indian joint family, when a joint family interest might be said to cover rights acquired to property by several individuals belonging to the family, but when the rights, which might otherwise be merged, are conferred by titles taken in the names of different members of the family, and thereby the means of articulate differentiation is continued as effectively as by the artifice employed in England of the setting up of a trust *ad hoc*, then it appears to their Lordships that these circumstances are elements for consideration''.

It must be admitted that their Lordships were considering the rights created under the *Mukarrari* and *patni* leases in this case while we are concerned here with a mortgagee's rights who had succeeded to his mortgagor's estate but since their Lordships were dealing with the principles underlying the law of merger and also referred to the devices adopted by people in England as a convenient method of indicating intention and for the purpose of keeping up the separation of title when there is a fusion of two kinds of rights in one person we have quoted extensively from this judgment. These observations would be of great help to us when we are considering the effect of Timma's action in making a transfer of his rights to his wife Chinnamma Rao. Two other decisions were cited by Mr. Satyanarayana Rao in this connection. There are observations at pages 543 and 544 in one of them *Subbarayudu* v. *Lakshminarasamma*[1], which go to support his contention. It is true that they are *obiter* and were not, as it was a case of conventional subrogation, necessary for the decision of that case. But since they were made by our esteemed brother Venkataramana Rao, J., and were based on a consideration of a large number of cases, they are entitled to great respect. The last case on which reliance was placed was a decision by their Lordships of the Privy Council in *Someshwari Prasad* v. *Maheshwari Prasad*,[2] where in holding that the interest of a Khorposhdar in the land granted to him for maintenance by the holder of an impartible estate did not merge in the estate on its subsequent purchase by the grantor, Sir Shadi Lal who delivered the judgment of the Board observed at page 7 as follows:

"There is neither a statutory provision in India nor any rule of common law which can be cited in support of merger in a case of this character. Nor can merger be established on the doctrine of justice, equity and good

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1. (1939) 2 M.L.J. 533.
2. (1936) I.L.R. 16 Pat. 1: L.R. 63 I.A. 441 (P.C.).

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conscience. Even in cases where a lesser interest vests in a person who holds the greater interest, merger would depend upon the intention of that person. If no intention is expressed or implied, or the party is incapable of expressing his intention, the Court has to consider what is beneficial to him'':

It is true that this was not a case to which S. 101 could in terms be held to be applicable; but the observations make it clear that the language of S. 101 of the Transfer of Property Act and in any case, the principles underlying it were taken by their Lordships into consideration.

The same result was arrived at by the House of Lords in *The Liquidation Estates Purchase Co., Ltd.* v. *Sir John Christopher Willoughby*,[1] when reversing the decision of the Court of Appeal that in the absence of any evidence in the deed or the circumstances of any intention to extinguish the charge and when it was for the purchaser's benefit to keep it alive, the assignment of a charge upon the property to a person who had purchased its equity of redemption was not extinguished.

Our conclusion, thus, is that even if it be assumed for the sake of argument that Timma became absolutely entitled to the villages mortgaged to him by Akkappa during his lifetime, there would be no merger under S. 101 of the Transfer of Property Act and the provisos or exceptions to the section would prevent the subsequent rights from being merged in the encumbrance which he held previous to his accession to the impartible estate.

There is, however, another difficulty in the respondents' way in this connection which seems to us to be insurmountable. It would be remembered that Timma succeeded to the impartible estate in 1905. Whatever the legal position of the impartible estate holders before the Impartible Estates Act came into being was, there is no doubt that they could not after that enactment be regarded as absolute owners of the estate, their powers of disposal to a large extent being limited by virtue of S. 4 of that Act. This enactment reduced the status of these estate holders to be that of merely qualified owners. If that be so, even the first portion of S. 101 would not be applicable to the facts of the present case and the encumbrances held by Timma before he succeeded to the impartible estate would not merge in the equity of redemption for the simple reason that he could not be held to have become an absolute owner of the property on Akkappa's death. Ghose in his Law of Mortgage (Vol. I, p. 524, 5th Edn.) states the proposition thus: But I believe the expression 'absolutely entitled' which occurs in the section does not imply the absence of intervening charges but has reference only to the nature of the estate and is used for the purpose of designating what English lawyers call the fee simple as opposed to a limited estate.

"If I am right in this view no question of merger can arise in the case of a person who becomes entitled only to a qualified estate in the property . . . . ."

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1. (1898) A.C. 321.

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To the same effect was the decision in *Sonaulla Karikar* v. *Abu Sayad Md. Ismail,*[1] to which we had referred in another connection. Mr. Justice Suhrawardy who delivered the judgment in that case observed as follows:

"Where the full interest and the limited interest coalesce, the limited interest is extinguished. But in the present case, there was no combination of the two interests. The word 'absolutely' is used in the section to indicate that the interest in which the encumbrance should merge must be the absolute interest and not a limited one. And the incumbrancer must become entitled to the absolute interest".

If this reason is sufficient to prevent the extinction of liability and to avoid a merger, it would be unnecessary to go into the question of intention or that of benefit. But since we have discussed the questions of intention and of benefit in some detail already, it would be better if we record our conclusions in that respect as well. The impartible estate, as we have already stated in the beginning, was heavily encumbered during Akkappa's lifetime (Exs. Z-1 and Z-2) with the result that it was taken over by the Court of Wards sometime in 1900 and continued to be administered by them for about three months even after Akkappa's death in 1905. Shortly after Timma's succession to the estate, however, the Court of Wards must have considered the task of administration of such an encumbered estate to be hopeless and decided to discontinue their own administration and delivered possession of the estate to Timma. Timma, thus succeeded to the impartible estate at the time when it was heavily encumbered and it would have been obviously to his benefit to keep the encumbrances which were already executed in his favour alive and distinct from the impartible estate which had devolved on him subsequently. This by itself would be enough to hold that the liability under the mortgage Ex. F-1 was not extinguished; but Timma's conduct almost from the time that he succeeded to the impartible estate, also leads to the same conclusion. It was admitted in paragraph 10 of the amended written statement of the 1st defendant that a sum of Rs. 21,045-2-3 was received by Timma between June, 1906 and September, 1908, in regard to his mortgage. This payment is supported by Exs. 1-C, printed at page 175 and Ex. AA-1, printed at page 151 of the records. This would clearly show Timma's intention to keep it separate from the equity of redemption to which he succeeded in 1905. We also find that he received three more payments in 1914 and 1916 towards Ex. RR. (Exs. XVI, XVII and XVIII) aggregating to Rs. 1,900. But before this Timma attempted to transfer the mortgage Ex. F-1 to his wife Chinnamma Rao in 1912 (Ex. PP-1), under legal advice and then having split up the amount due under that deed into two, executed two mortgage deeds Exs. QQ and RR, apparently in his capacity as a representative of Akkappa—the mortgagor. Ex. QQ was a usufructuary mortgage for Rs. 50,000 and Ex. RR a simple mortgage for the balance of Rs. 63,630 which was according to him due at the time as regards the mortgage Ex. F-1. The property covered by Ex.

1. (1929) I.L.R. 57 Cal. 473.

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RR, it may be remembered, was new and did not form a part of the mortgage executed in 1899.

The criticism by Mr. Narasimhachar in regard to this conduct relates first of all to the time when this intention might be taken to have been expressed by Timma. His contention is that Timma should have declared either expressly or by necessary implication on the date on which he succeeded to the impartible estate in 1905 that he would keep the mortgages executed by Akkappa in his favour alive and distinct from the rights which he acquired to the estate on Akkappa's death. There is no doubt that the relevant date, in order to ascertain Timma's benefit was when he succeeded Akkappa. We have already shown how the merger of the encumbrances which he held with the equity of redemption would not have been for his benefit. As for the intention, the contention that the owner of a charge or encumbrance must simultaneously with his succeeding to the equity of redemption, declare his intention to keep the charge or encumbrance alive expressly or by necessary implication and if he fails to do that, the liability must be held to be extinguished is not sound. It would be enough in our opinion for him to do so within a reasonable time at least although the rule deducible from *Hatch* v. *Skelton*[1], appears to be as referred to in Halsbury, Vol. 13, paragraph 173, and as stated in Vol. 23, paragraph 767 (Hailsham) that his conduct during the remainder of his life would be relevant unless of course, he has already said or done something which would show that he has decided not to keep his previous encumbrance or charge distinct from his subsequently acquired rights. Akkappa died in May, 1905. Timma could not, however, get the impartible estate from the Court of Wards until August, 1905 and the receipt of money due under the mortgage deed Ex. F-1 in June, 1906, was not more than ten months after he succeeded to the estate. In the absence of any other conduct to the contrary, Timma's conduct in receiving the money towards his mortgage (Ex. F-1), in 1906, coupled with his subsequent conduct in trying to convey the security to his wife, leave no doubt in our minds as to his intention and the expression of that intention from 1906 onwards must be held in the circumstances to be sufficient.

This is, however, not all. It was argued by Mr. Satyanarayana Rao that the mortgage Ex. F-1 was Timma's joint family property and since he and his son, the present plaintiff, were members of a coparcenary, the rights acquired by Timma under Ex. F-1 could not possibly merge with the rights which he acquired in his personal capacity as a successor of the impartible estate and that inasmuch as the capacities in both these cases were different, there could be no merger. In view of our decision that there could be no merger of the mortgagee's rights acquired by Timma with those which he acquired on his accession to the impartible estate under S. 101 either on account of the fact that he had not become absolutely entitled to the estate in 1905 or that the merger was not for his benefit and that he had been express-

1. (1855) 20 Beav. 453: 52 E.R. 678.

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ing his intention to the contrary from the time it was possible for him to do so, it seems to us really unnecessary to go into this question at this stage although it may be necessary to do so in connection with the gift which Timma is said to have made in favour of his wife Chinnamma Rao. We will not, therefore, discuss this question here but reserve it to be discussed, if necessary, later.

Learned counsel for the respondent then urged that even if the encumbrance be held not to have been extinguished under S. 101 of the Transfer of Property Act, it must be held to have been so independently of that section as a person cannot be, on general principles of law, held to occupy the position of both a creditor and a debtor in regard to the same debt. The contention is that S. 101 is not exhaustive and does not provide for every case of extinction of liability. When a secured debt for instance, it was argued, ceases to exist by virtue of a payment, liability to discharge the debt would cease and the security for the debt must in consequence be found to have come to an end. No exception can be taken to this statement so far as it goes; but it is in our opinion entirely useless to the respondent. Security in a case such as suggested by the learned counsel for the respondent, would be extinguished by the acts of parties as soon as the mortgagor has paid the mortgage money after it became due and got the mortgaged property re-transferred or got an acknowledgment in writing (registered in cases where the mortgage deed was registered) to the effect that the mortgagee's rights have ceased to exist or that all the rights in derogation of the mortgagor's interest have been extinguished. It may also be extinguished by other acts of parties such as a remission or a gift or by operation of law, *e.g.*, a decree for foreclosure. There is then no difficulty in agreeing with the contention that the term "extinction of liability" is more general than that of 'merger' and the latter provides for only one of the methods by which liability is extinguished. But the learned counsel goes wrong, in our opinion, when he adds that as soon as there is an identity of *jural persona* of a secured creditor with that of his debtor, the liability for the debt must be held to have been extinguished and the security for the debt discharged. It must be borne in mind that we are not dealing here with cases where a person under a personal covenant to discharge the debt comes to occupy the position of a creditor. Cases of that type would be governed by decisions such as contained in *Malireddi Ayyareddi* v. *Gopalakrishnayya*,[1] to which we have already referred. But where there is no such covenant, the effect of agreeing to this contention would be really to amend S. 101 of the Transfer of Property Act. It cannot be denied that the case of a secured creditor who is or becomes absolutely entitled to the immovable property over which he had a charge or incumbrance would be covered by the first part of S. 101. In Mr. Narasimhachar's words there would be an identity in such a case of *jural persona* of the secured creditor with that of the debtor who

1. (1923) 46 M.L.J. 164: L.R. 51 I.A. 140: I.L.R. 47 Mad. 190 (P.C.).

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is or becomes entitled to the immovable property. If this is correct, there should be an extinction of liability according to the learned counsel for the respondent. But the section contains two provisos or exceptions—which we must ignore if (we) are to get the result desired by Mr. Narasimhachar and this, it is obvious, we cannot do. The fact is that the present case falls within the ambit of S. 101 and as long as it falls within the provisions of that section, it would be impossible for us to go beyond its terms—however plausibly the argument may be put. Two English cases were cited by the learned counsel for the respondent in this connection. The decision in *Hummel* v. *George Routledge and Sons, Ltd.*[1] is governed by the same principle on which the decision of their Lordships of the Privy Council in *Malireddi Ayyareddi* v. *Gopalakrishnayya,*[2] was based. A limited company which had issued certain debentures and had thus agreed to pay the debts for which the debentures were issued purchased some 16 debentures itself, subsequently. It was held that the result of the purchase of the debentures by the company was that in each case the debt was absolutely gone and the security had therefore also ceased to exist. Inasmuch as Timma had neither raised the loan as was done by the limited company nor had he, unlike the company, undertaken any personal liability for the same, this case can render no assistance to the respondent. The second case was that of *Ellis* v. *Kerr,*[3] where a covenant to which some of the covenantor and covenantees were common was held void. This is not the plea raised in the present case. The contention just now is that the mortgagee's rights were extinguished as soon as they came to vest in a person who happened to become a representative of the mortgagor subsequently and this case is no authority for that contention. Moreover, as we have observed more than once in the course of this judgment that if we find a case covered by a provision contained in the statute law of this country, it will be our duty to apply it regardless of any consideration as to what the law in any other country is.

Since the present S. 101 of the Transfer of Property Act after its amendment in 1929, would not apply to the facts of the present case, it was contended by Mr. Narasimhachar towards the close of his arguments on this point that the section after its amendment by Act XX of 1929 must be held to be retrospective in its operation and the present law must be held to have been in existence even before the Amending Act was passed. In support of this contention, he relied on a Full Bench decision of the Allahabad High Court in *Tota Ram* v. *Ram Lal.*[4] Under general principles of construction, retrospective effect cannot be given to a statute unless an intention to that effect is expressed therein in plain and unambiguous language or at least unless such an interpretation arises by necessary implication. (See also *Srinivasalu Naidu* v. *Damodaraswami Naidu*)[5]. There is nothing in

1. (1904) 2 Ch.D. 474.
2. (1923) 46 M.L.J. 164: L.R. 51 I.A. 140: I.L.R. 47 Mad. 190 (P.C.).
3. (1910) 1 Ch.D. 529.
4. (1932) I.L.R. 54 All. 897 (F.B.).
5. A.I.R. 1938 Mad. 779.

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the Amending Act XX of 1929, wrich may lead us to construe that Act in that manner. It is impossible to hold that the other sections of the enactment were retrospective in character simply because only some of the sections were stated not to have any retrospective effect. This as observed by Mr. Justice Varadachariar in the Full Bench case of *Lakshmi Amma* v. *Sankaranarayana Menon*:[1]

"may well be a provision inserted *ex majore cautela*".

Nor is it possible for us to apply the principles underlying the amended section on the ground that it would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of the Act XX of 1929. This would be virtually holding the section to be retrospective in effect and to ignore that the Legislature must have intended to amend or alter the law from what it was before the Amending Act was passed, although the change in the language clearly points to the conclusion that the Legislature intended to amend the law. A Division Bench of this Court in *Kanjee and Muljee Bros.* v. *Shunmugam Pillai*,[2] also takes the view that the Amending Act of 1929 cannot be held to be retrospective in its operation. We have, thus, no hesitation in repelling the contention raised by Mr. Narasimhachar that the amended section or the principles embodied in the amended section should be held applicable to a suit which was started two years earlier. Nor is it possible to hold that the Amending Act of 1929 was purely declaratory and was merely reproducing the law as it existed prior to that date. A comparison of the various sections on the old Act with the provisions contained in the Amending Act would show at once that such a contention is unjustified. For the above reasons we must hold that the rights under the mortgage deed Ex. F-1 were not extinguished when Timma happened to succeed to Akkappa.

The next important question which we have been called upon to decide in this case relates to the nature of the transactions covered by the deed of gift, dated the 19th August, 1912 (Ex. PP-1) by Timma favouring his wife Chinnamma Rao, of the mortgage which was executed by Akkappa in his favour on the 1st April, 1899 (Ex. F-1) and by the two subsequent mortgage deeds which Timma executed as the holder of the impartible estate on the 2nd January, 1913. The sum of Rs. 50,000 for which the mortgage was executed in 1899 had, according to Timma, swelled to Rs. 1,13,630 by January, 1913, when the two mortgage deeds were executed. This debt was, as stated before, divided into the two bits, one of which was covered by the usufructuary mortgage Ex. QQ and the other by the simple mortgage Ex. RR which forms the basis of the present suit. The plaintiff's case is that the transfer of title under the deed of gift Ex. PP-1 and the execution of the deeds of mortgage Exs. QQ and RR were effected under legal advice to prevent a merger—the use of Chinnamma Rao's name being really benami for Timma. It is true that the plea raised in the plaint was not happily worded and the plea

1. (1935) 70 M.L.J. 1: I.L.R. 59 Mad. 359 (F.B.).
2. (1932) 63 M.L.J. 587: I.L.R. 56 Mad. 169.

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of *benami* which was attempted to be made out at the hearing in the trial Court and before this Court was not expressly taken; but the user of the expression that the transaction was nominal seems to have been really intended to convey that Chinnamma Rao's name was *benami* and that Timma did not intend to part with the mortgagee's rights at all. As is well known, pleadings in India are not up till now, drafted with as much care and precision as they should be and it would not be proper or conducive to justice to interpret them very rigidly. Mr. Narasimhachar took some pains before us to distinguish between a nominal and *benami* nature of a transaction and although we entirely agree with him that there is considerable difference between the two, we think that the case put forward in the plaint was not really different from what was attempted to be made out at the hearing. We have, therefore, to decide whether the gift by Timma in favour of his wife Chinnamma Rao was a real gift or was *benami* in character and merely intended to be for his own benefit. If the gift was real, the suit must fail as the mortgage then could not be enforced by the plaintiff who is Timma's son but by Rangamma as the daughter of Chinnamma Rao and on her, *i.e.,* Rangamma's demise, by her son, the 5th defendant in the suit. Mr. Narasimhachar also attempted to argue the question that if the gift in favour of Chinnamma Rao was not real but was merely nominal or *benami* the mortgage deed Ex. RR in favour of Chinnamma Rao would be, as no money could then be said to have been due to her by the impartible estate, without consideration. Lastly it was contended that Timma was not entitled to effect the mortgage in view of the limitations placed on holders of impartible estate by Act II of 1904.

To take up the question as to the nature of the gift first. It was pointed out to us by Mr. Satyanarayana Rao that the device to introduce Chinnamma Rao's name was resorted to by Timma with the object of keeping his capacity as a mortgagor distinct from his capacity as a mortgagee and even if legal title be assumed to be vesting in her, there would be a resulting trust in Timma's favour and would be enforceable on his death by his son—the present plaintiff. In order to determine the nature of this deed of gift it is necessary to take the position of parties, their relationship to each other, the surrounding circumstances, the motives which could govern their actions and their subsequent conduct into consideration.

As for the position of the parties to the deed of gift Ex. PP-1, the gift was made by a husband in favour of his wife. Ordinarily if a transfer is effected as between a husband and wife, the presumption, in the absence of any other circumstance to the contrary, would be that the transferee holds the property for the benefit of the transferor. The circumstances which were prevailing at the time when this document was executed by Timma, if considered along with the oral evidence, point to the conclusion that the object of this so called gift was to improvise a scheme by which the mortgage Ex. F-1 may be enforced. The Kalahasti estate, as shown by Exs. Z-1 and Z-2 was heavily encumbered and Timma could not, even after his succession to that estate,

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do very much to reduce that burden. This would be clear from the fact that he had himself executed a mortgage deed on the 4th August, 1908, for no less than a sum of rupees Six lakhs. Since Timma had succeeded to the estate of Kalahasti when it was so heavily burdened, he must have realised the difficulty of recovering the debt due to him under the mortgage deed Ex. F-1. The statement made by Mr. Srinivasachari, P.W. 3, who was a lawyer of some standing and who had special means of knowledge in regard to the facts to which he deposed, is, in our opinion, quite trustworthy and was not, in fact, challenged seriously on behalf of the respondents. It was not disbelieved by the trial Court and we have no doubt that he was a witness of truth. He was a senior member of the Chittoor Bar and retired from practice some three years ago. The statement of P.W. 2 is also more or less to the same effect.

Let us now examine the circumstances and the documents on which Mr. Narasimhachar has placed reliance in order to show that the deed of gift was real. The first circumstance on which he relied was that the donee happened to be Timma's second wife while the plaintiff was the son of the first wife Chellamma who had died before Timma married for the second time. Chellamma and Chinnamma were sisters. It was alleged that there was misunderstanding between the plaintiff and his father Timma at the time when the latter made the gift in favour of his wife, and that the son had instituted a suit against his father (O.S. No. 30 of 1910) alleging mismanagement and praying for the appointment of a receiver. This would have been of some assistance to Mr. Narasimhachar's clients but unfortunately for them we find that this suit was not fought out to the end and was withdrawn. Mr. Narasimhachar has been unable to show anything on the record which would lead us to presume that the suit was withdrawn because the plaintiff thought that it could not be successfully prosecuted against his father and not on account of some understanding having been arrived at between them. There is no reliable evidence on the record to show that there was any misunderstanding between the father and son on the date when the deed of gift was executed. The defence witness D.W. 3 who deposed to ill-feelings between the plaintiff and his father during the cross-examination by defendants 1, 3 and 5 had to admit in the cross-examination by the plaintiff that they became friendly a year after the suit had been disposed of and continued to be so until the father's death. D.W. 4 who was a more reliable witness does not say anything beyond the fact that the relations between the father and son were not friendly for sometime from 1910. The statement by P.W. 3 goes no further. On the other hand the statement by P.W. 5, who is an old man and being as he says a physician for both Timma and plaintiff to the effect that they began to live together after the suit was withdrawn, points to a different conclusion.

Our attention was next invited to a number of letters written by Timma to his counsel P.W. 3 in the case and letters written by P.W. 3 to Timma. As to the latter, we find the letters by P. W. 3 to Timma were not put to P. W. 3 in cross-examination

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although his statement, if true, would go to show that the deed of mortgage was transferred by Timma to his wife for his own benefit and simply because he could not bring a suit on the deed himself. The letters written by Timma to this witness, such as Exs. FFF, FFF-3 and GGG-4 are not very material for deciding the question whether the transfer by Timma was real. Since documents were executed by Timma first in his capacity of a mortgagee and subsequently in the capacity of being a holder of an impartible estate, it is only natural that in his correspondence with P.W. 3, he would keep up the fiction and write to him in regard to the money due under the mortgage Ex. QQ in the name of his wife. But when the money in regard to Ex. QQ was received, and this is extremely important, it appears to have been credited to Timma in Timma's accounts (Ex. EEE). This document was challenged before us by Mr. Narasimhachar as a forgery. It happens to be in the handwriting of one P. Govindu and is signed in the end by one M. Pulliah, the cashier, both of whom died in 1938. It is proved by the statements of P.W. 1 and 2 who swore before the Court that they could identify their handwriting and signatures. The Court seal on this document shows it was originally produced in the Chittoor Sub-Court in 1922 in O.S. No. 15 of 1922. This suit was disposed of in 1927, but before it was decided, the plaintiff instituted another suit (O.S. No. 1 of 1926) against Rangamma for the recovery of the Rs. 50,000 in regard to Ex. QQ. But when it was discovered that this money had been received by Timma himself and was duly entered in the chittas which were produced by the plaintiff in 1922 in O.S. No. 15 of 1922, the second suit had to be withdrawn. Had the document been forged in 1922 at the instance of the plaintiff, it is impossible to believe that he would have forgotten this fact in 1925 and brought a suit for the recovery of Rs. 50,000 against his step-sister. We have seen the document ourselves and it appeared to us to be genuine. The lower Court does not consider it safe to rely upon the solitary entry in this document as it does not contain Timma's initials and signatures; but we consider it to be hardly likely that Timma, the Raja of Kalahasti, as he then was, would initial or sign the chittas himself. The fact that it was filed after Timma's death does not detract from its value. It could not have been produced in Court obviously before a litigation started and there was no litigation in regard to this matter till December, 1919, when Timma died. It may be, that the document is in one person's hand, but if a person continues to be an accountant for a number of years as Govindu was, the fact that the whole of the document was in his hand, would not create any suspicion. To say that the whole document was written in one ink and what appears to be an innuendo underlying therein, at one time does not seem to us to be correct, and is not, in any case, borne out by anything on the record. The appearance of the document and the evidence of these witnesses unrebutted as it is, leads us to hold that the document was a genuine one and the money was received by Timma himself and credited in his account. If the money due under Ex. QQ was actually received by Timma himself as we find it

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was, it would throw considerable light on the nature of the deed of gift Ex. PP-1 and of the mortgage deeds Ex. QQ and Ex. RR. Similarly when certain monies were received by Timma by sale of certain villages covered by Ex. F-1 from D.W. 1 and for which sale deeds Ex. XVI, XVII, and XVIII were executed in his favour, they find a place in Ex. EEE. The statements contained in these sale deeds that the sales were effected with the object of paying off Chinnamma Rao and on account of Ex. QQ or Ex. RR show the reason for the sale but do not lead us to conclude, in the absence of any other evidence, that the money was actually received by Chinnamma Rao and not by Timma himself as shown to have been entered in Ex. EEE. Nor do certain claim petitions in Chinnamma Rao's name carry the case any further. It was Timma who was writing to his lawyer and since the deed of gift was executed in favour of Chinnamma Rao in order to enable him to recover the mortgage amount originally due under Ex. F-1 and this fact was known to his lawyer, there is nothing surprising in the petitions being made in Chinnamma Rao's name.

It was then argued that the plaintiff has made certain admissions and since he has not gone into the witness box to explain them, they should be taken to be more or less conclusive against him. These admissions are said to be contained in Exs. III and V. It must be remembered, however, that these statements appear to have been made not in regard to Ex. RR which forms the basis of the present suit but in regard to Ex. QQ which has been discharged already. Moreover, the original document (Ex. III) does not say, as the translation at page 209 of the printed records does, that a sum of Rs. 50,000 was 'due' to the Rani Garu. The word 'due' does not appear in the original although there is no doubt that after the sum of Rs. 50,000 the word Rani Garu does appear in the original. Whether it was intended to be conveyed that the money was due to her or only that the money was payable in her name is not clear. The second document on which reliance is placed is a copy of the plaint in O.S. No. 1 of 1925 (Ex. V). This suit, as observed before, was instituted by the plaintiff against his step-sister Rangamma and the plaint contained the plaintiff's allegation in paragraph 8 that his father was executing nominal deeds of sale and gift in favour of his wife Rani Chinnamma Rao and an assertion in paragraph 9 that the said deed of gift was void in law and passed no interest to his mother and that his father was not competent in law to make the gift. Then follows the statement in paragraph 12 on which stress was laid on behalf of the respondent that Rani Chinnamma Rao was put in possession of the properties. This might have been so but we cannot overlook the fact that the suit was for the recovery of the Rs. 50,000 which she was stated to have realised in regard to the mortgage Ex. QQ without any right or authority. The suit was withdrawn apparently because it was found to be based on a misapprehension and the statement even if taken to be an admission, cannot be, in view of the plaintiff's discovery that it was wrong, regarded to be of any value. But even if it be not so, it contains no admission which can be of any assistance to the respondent. The plaint has to be read as a whole and it is im-

possible to tear a sentence out of the context and read it regardless of what was said there both before and after. If read as a whole it cannot be construed to say that the plaintiff ever admitted that Chinnamma Rao was the sole owner of the money due under the mortgages Exs. QQ and RR.

Lastly, it was alleged that in the suit O.S. No. 1 of 1917 (a suit for redemption by defendants 1, 2 and father of defendant 3 against Raja Narasingh Girji) which was finally disposed of by their Lordships of the Privy Council and is reported in *Narasingh Girji* v. *Parthasarathi Rayaynim Garu*,[1] Timma although a party did not raise any plea that any money was due to him under the mortgage—Ex. F-1 or its successors Ex. QQ and Ex. RR. This it was contended would show that the gift to Chinnamma by Timma was real. But no copy of Timma's written statement has been produced in this case, and in the absence of any evidence on the record, it is impossible to hold that Timma had raised no such plea.

In this connection, the defendants filed a Civil Miscellaneous Petition in this Court No. 5980 of 1939 with the object of producing certain documentary evidence on the record. The application is extremely belated. When the suit was remanded by the High Court in 1938, the defendants were authorised to file an additional written statement and produce such further documents as they considered necessary. They did file an additional written statement and produced documents. But no reference to the execution petition in E. P. No. 29 of 1921 in O.S. No. 9 of 1910 or to the counter-affidavit in E.P. No. 29 of 1921 was made by them. Moreover, it would be useless for us to permit certified copies of documents to be produced at this stage as we find that they are not being admitted by the other side. We are not satisfied that copies of an execution petition or of a counter-affidavit are public documents and do not require to be proved before they are admitted in evidence. Had we therefore been inclined to accept these documents it would have been necessary for us to permit additional evidence to be recorded. This in the circumstances we would not have permitted. The result is that C.M.P. No. 5980 of 1939 is dismissed.

The only other point which was urged by Mr. Narasimhachar to prove the reality of the gift was that Rangamma received a sum of Rs. 8,000 from the 2nd defendant in 1924. Bearing in mind her relationship to the 1st defendant, we are not inclined to attach any importance to this fact. Timma died in 1919 and two suits at least were brought after his death by the present plaintiff, the latter being, as we have said before, O.S. No. 1 of 1925 against Rangamma herself. There is no doubt that the contesting defendants, were, to a large extent, favouring Rangamma and this is borne out even by the position taken on behalf of the 5th defendant in the present suit.

Having considered all the circumstances and documents which were referred to us by Mr. Narasimhachar we are of opinion

1. (1924) 47 M.L.J. 809: L.R. 51 I.A. 305: I.L.R. 47 Mad. 729 (P.C.).

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that the deed of gift Ex. PP-1 was not a real gift and was executed by Timma *benami* for his own benefit and that in executing Ex. RR, Timma conferred rights on Chinnamma Rao only with the object of her being able to realise the money for him. We have also no doubt that the devices of first making a gift and then executing Ex. RR were resorted to by Timma in order to enable him to save his mortgage Ex. F-1 from the hands of the creditors of Kalahasti estate and to be able to recover his money through Chinnamma Rao's agency. We have already quoted extensively from the judgment of their Lordships of the Judicial Committee in *Dulhin Lachhambati Kumari* v. *Bodhnath Tiwari*,[1] which would show that what could be done in England by the creation of a trust for the purpose of keeping up the separation of title was attempted to be done by Timma under legal advice by the *benami* transfer of the mortgage to his wife Chinnamma Rao to avoid the complication which had come into existence on account of Timma's accession to the impartible estate and thus to save the money from being lost.

Since we have come to the decision that the gift and the mortgage made by Timma were *benami* for himself and not nominal, it is unnecessary for us to consider any further if the mortgage Ex. RR was without any consideration at all. That contingency could have arisen only if we were of opinion that the transfers under Ex. PP-1, Ex. QQ or Ex. RR were nominal only. Nor is it necessary for us to consider the question as to what result would have followed if we had found in favour of the reality of gift and transfers.

The only contention raised by the learned counsel for the respondent, if we arrived at the conclusion that the transfers Ex. RR were *benami*, was that even if the mortgage deed (Ex. F-1) executed by Akkappa was found to be binding on the Kalahasti estate, a fresh security could not be, after Act II of 1904 had come into existence, created by Timma and the mortgage deed Ex. RR cannot therefore be enforced. The only restrictions placed on the proprietor of an impartible estate in regard to the alienation of such estates are to be found in S. 4 of that Act; and after reading the section the only question which emerges for decision on this point is whether under the circumstances existing in this case Timma would have been as a managing member of a joint Hindu family (not being the father or grandfather of the other coparceners) entitled to make an alienation of the joint property in such a manner as to be binding on shares of other coparceners independently of their consent. This resolves itself into the question whether the alienation by Timma (Ex. RR) was made either for legal necessity or for the benefit of the estate. There is no doubt that Akkappa had executed Ex. F-1 in 1899 as he owed money which he was liable to pay under the promissory note Ex. G and for the balance of what had still remained unpaid out of the decree in O.S. No. 12 of 1890. These Akkappa was bound to discharge as long as he was alive. This is

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1. A.I.R. 1922 P.C. 94: L.R. 48 I.A. 485 (P.C.).

however not enough. We must find if Timma's act could be justified on the ground of benefit or necessity to the estate. Since there can be no doubt that Akkappa would have been bound to maintain the members of his family out of the impartible estate in his possession, if the same be regarded for this purpose as joint family property and inasmuch as the decree in O.S. No. 12 of 1890 was passed against him in respect of the arrears of maintenance and some of these had remained unpaid and the promissory note Ex. G was executed by him partly in respect of interest which was payable by him towards the mortgage deed Ex. M and partly in discharge of the debt which he owed to one Mr. Sesha Aiyar, a Vakil of Tirupati, under a promissory note, dated the 30th April, 1898, which was transferred to Timma and for the maintenance allowance due to Timma for 3 months, the mortgage deed Ex. F-1 in 1899 must be held to have been executed by Akkappa for necessity and to discharge antecedent debts. If the alienation by Akkappa is found to be one for necessity and binding on the estate, a renewal of the same by his successor in 1913 must also be held to be effective and of a nature which Timma as a managing member of a joint Hindu family would have been entitled to make.

It was contended on behalf of the appellant that Timma was in any case incompetent to make a gift of the mortgage Ex. F-1 in favour of his wife Chinnamma Rao on the ground that it consisted of joint family property and could not be bequeathed after the plaintiff had been born as he undoubtedly was. The contention is that inasmuch as the will executed by the C.S.I. Rajah in 1881 (Ex. A) created the maintenance and other property given to Timma under the will as joint family property and formed a kind of nucleus out of which the mortgage Ex. F-1 was taken, it must be held to be joint family property. It was also urged that as under the Razinama, dated the 1st August, 1892 in O.S. No. 12 of 1890 (Ex. C) the decree passed thereon (Ex. C-1) and the agreement, dated the 14th October, 1896 (Ex. D), the amount of maintenance which was agreed to be given first by Muddu Venkatappa and then by Akkappa was not only for Timma's maintenance but was intended to be made also for the plaintiff, the mortgage which was taken by Timma must therefore be held to be the joint family property of the father, *i.e.* Timma and of his son—the present plaintiff. Mr. Satyanarayana Rao argued that if it could be shown that Timma had sufficient nucleus out of which the mortgage Ex. F-1 could have been secured by him the onus must lie on the respondents to show that the money belonged to Timma personally and was not that of the joint family. It was submitted that not only was the maintenance granted by Akkappa to be regarded as belonging to the joint family but that the income of the village received by Timma under his father's will along with jewels and other movable property of high value which the former had received from the latter must be held to be joint family property—the possession of these properties being by itself sufficient to raise a presumption as to the joint family character of the money due under the mortgage Ex. F-1.

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It would be remembered that although O.S. No. 12 of 1890 was instituted not only by Timma but on behalf of the present plaintiff also yet the allowance that was fixed in the compromise Ex. C was for Timma alone, and the plaintiff's name was not even mentioned. The words 'and his male descendants' used in paragraphs 1 and 4 of the agreement (Ex. D) do not in our opinion convey the idea suggested by Mr. Satyanarayana Rao that the maintenance was being granted to Timma and his descendants jointly. We take them to mean on the other hand that it was granted to him from generation to generation and could be claimed by his descendants only after his death. The question whether the right of a member of an impartible estate holder's family to maintenance arises as a result of his co-ownership in the joint family property which the impartible Zamindari is considered to be or is wholly inconsistent with the Zamindar's interest in the property does not call for a decision in this suit. There are two recent conflicting decisions on this point in this Court for which see *Maharaja of Venkatagiri* v. *Rajarajeswararao*[1] and *Obla Kondama Naicker Ayan* v. *Raja Venugopalaswami Obala Kondama Naicken Ayan*[2], to which one of us was a party. Based as both of them are on certain Privy Council decisions, we have no doubt that the difference would be authoritatively settled in due course. But whatever the basis of the right of maintenance may be, there is no doubt that Muddu Venkatappa, who took the impartible estates or even Timma who, so far as the maintenance and the village given to him under the will are concerned, took portions thereof under his father's will must be taken to have done so in accordance with the Privy Council decision in *Ulagalum Perumal Sethurayar* v. *Rani Subbalakshmi Nachiar*,[3] as self-acquired property; and in the absence of any custom to that effect, the claim to maintenance at all events made by Timma in O.S. No. 12 of 1890 from his brother Muddu Venkatappa, although based on their father's will must be held to have been, in consequence of the compromise (Ex. C) and according to the decision in *M. Subbayya Thevar* v. *Sivagnana Marudappa Pandian*,[4] made or granted not as of right but only by way of grace. It may be that the maintenance was granted by Muddu Venkatappa to all his brothers—but this did not mean that the grant was made to the head of each branch of the family as such and even if each brother's descendant is held entitled to sue subsequently, it would be on the basis of the agreement arrived at originally between Muddu Venkatappa and his brothers as modified by other agreements and not because they had any right to be maintained out of the estate independently of any custom or agreement. The village granted to Timma by his father C. S. I. Raja under his will may be in view of certain decisions of this Court *Nagalingam Pillai* v. *Ramachandra Thevar*,[5] *Indoji Jithaji* v. *Kothapalli*

1. (1939) 1 M.L.J. 831: I.L.R. (1939) Mad. 622.
2. (1939) 1 M.L.J. Short Notes, p. 39 (A.S. No. 77 of 1935).
3. (1939) 1 M.L.J. 812: L.R. 66 I.A. 134: I.L.R. (1939) Mad. 443 (P.C.).
4. (1936) 71 M.L.J. 568: I.L.R. (1937) Mad. 42.
5. (1901) 11 M.L.J. 210: I.L.R. 24 Mad. 429.

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Rama Charlu,[1] *Salakshi Ammal* v. *Doraimanikka Nadan*[2] and *Kasi Viswesra Rao* v. *Varahanarasimham,*[3] regarded as ancestral property but when we find that this village was (together with other villages mentioned in the will) continued to be enjoyed in spite of the will by the holder of the impartible estate (for which *see* paragraph 6 in Ex. C) and was agreed to be given up by Timma at the time of the compromise the contention loses all its force. It is true that Timma was in possession of family jewels of some value which were given to him under his father's will but there is no evidence in this case that they were ever sold by him and being unproductive of any income, cannot be assumed to have formed a nucleus for or the means of acquiring the various items contained in the mortgage Ex. F-1 even if the same is regarded to be immovable property.

In these circumstances the presumption that the mortgage deed was joint family property would not arise in our opinion. It is interesting to observe that the plaintiff alleged in his plaint against his step-sister Rangamma (Ex. DDD) that all the jewels (presumably those which are now alleged to have formed the nucleus) were taken away by her.

This takes us to issue No. 5. As to the first portion of the issue it is sufficient to say that nothing has been said by the learned counsel for the respondent, in spite of his elaborate arguments, to indicate that the mortgage deed Ex. RR was not true or invalid. As for the question of this deed being without consideration, the only argument put forward was based on the assumption that the deed of gift in favour of Chinnamma Rao (Ex. PP-1) was nominal or fictitious. It was conceded that if the transfer by Timma under the deed were found to be *benami* and not nominal, there would be no force in this contention. Since we have already arrived at the conclusion that the transfer by Timma under the deed of gift Ex. PP-1 was really *benami,* this part of the issue must be decided against the defendants. The money under Ex. F-1 was undoubtedly due and would form a good and valuable consideration for the mortgage Ex. RR.

The present suit was dismissed by the trial Court in the first instance, as observed before, in consequence of its finding on the second part of this issue. This portion of the issue reads as if it was intended to cover the objection regarding the plaintiff's *locus standi* to maintain the action on the ground of his father Timma being the mortgagor himself rather than the objection that Timma could not, if the transaction represented by the deed of gift Ex. PP-1 was merely *benami* for himself, execute the mortgage Ex. RR in his own favour. Since the point raised by Mr. Narasimhachar was that of law and we were not quite certain that this aspect of the question was not intended to be covered by the objection raised on behalf of the contesting defendants and it was actually considered and decided by the trial Court, we allowed it to be argued here as well.

1. (1919) 10 L.W. 498.
2. (1925) 49 M.L.J. 341: 48 Mad. 827.
3. A.I.R. 1937 Mad. 631.

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It would be remembered that the liability under Ex. F-1 was split up by Timma in January, 1913 and two mortgage deeds Ex. QQ and Ex. RR were executed by him, as the holder of the Kalahasti estate in favour of his wife Chinnamma Rao. We have already held that the gift Ex. PP-1 was not real and was effected to avoid a merger and intended to be for his (*i.e.* Timma's) own benefit. The argument advanced by the learned counsel for the respondents in this connection was that if the gift in favour of Chinnamma Rao be not held to be real, the execution of the mortgage deeds Ex. QQ and Ex. RR by Timma as a mortgagor (in his capacity of being Akkappa's representative) in favour of his wife as a benamidar for Timma the mortgagee would be wholly invalid on the ground that a person could not execute a deed of mortgage in his own favour or in other words, a debtor could not make a covenant with himself and thus become his own creditor. As observed elsewhere in this judgment, Ex. QQ was satisfied in Timma's lifetime and thus passed out of the controversy long ago. It must not be also overlooked that in view of the endorsement made on Ex. F-1 on the 1st August, 1904 by the Court of Wards (Ex. F-7) the liability under the mortgage deed Ex. F-1 was not barred by limitation. Moreover, the mortgage deed (Ex. RR) executed by Timma even if *benami* and made for his own benefit, was nevertheless, a transfer made with the object of clothing Chinnamma Rao with the legal ownership in the mortgage *Raja of Deo* v. *Abdullah*[1] and *Gur Narayan* v. *Sheolal Singh*,[2] although in view of the deed of gift Ex. PP-1 being *benami* in character there was to be a resulting trust in Timma's favour with the result that if she had succeeded in recovering any money due under the mortgage deed, she would have had to hold it for his benefit and repay it to him—*vide* S. 88 of the Indian Trust Act. Since Timma succeeded to Akkappa as the holder of the impartible estate, he would be entitled to renew the mortgage Ex. F-1; but this would be in his capacity as mortgagor's representative only. Timma's position could not be worse than if the money under the mortgage deed Ex. F-1 was paid on behalf of the mortgagor's estate to Chinnamma Rao who had the legal title to recover the mortgage money. Although the mortgage deed was undoubtedly to enure for his (*i.e.* Timma's) benefit ultimately, yet for the time being it was being made by Timma in favour of Chinnamma Rao who was a different person and since it was for Timma's benefit, there could be no objection to the plaintiff suing as Timma's heir for the recovery of that benefit—particularly as we find that the mortgagor's rights had passed to the defendants 1 and 2 and the father of the defendant 3 in the action. We do not think that there is any force in the contention that the document was invalid on account of the fact that Timma was executing it in favour of himself. It was not so *ex facie* and the same devise which English lawyers adopt to keep two estates distinct by the creation of a trust was being resorted to by Timma himself to

1. (1918) 35 M.L.J. 46: L.R. 45 I.A. 97: I.L.R. 45 Cal. 909 (P.C.).
2. (1918) 36 M.L.J. 68: L.R. 46 I.A. 1: I.L.R. 46 Cal. 566 (P.C.).

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keep the mortgage Ex. F-1 in his own favour alive and enforceable.

It was not disputed before us that in the absence of a merger it might have been possible for Timma the mortgagee to enforce the liability under the document Ex. F-1 even after he had succeeded to the impartible estate; but this, it was alleged, was due to the fact that there was a pre-existing liability which the Kalahasti estate was bound to discharge. If the pre-existing liability could have been enforced by Timma even after he had succeeded to Akkappa, no objection could be lawfully raised to Timma, the mortgagor, executing a deed of mortgage in favour of Chinnamma Rao although she might have been then really a trustee for the benefit of Timma, the mortgagee. It may at times happen that a person may come to occupy two capacities and may hold rights in one capacity against himself in another capacity. But it would not necessarily follow that his rights and duties are on account of that incident extinguished. A manager or karta of a joint Hindu family may in his capacity as a karta legitimately sell a joint family property for joint family necessity or benefit to one of the members of the family or even to himself in his individual capacity as long as the transaction is not fraudulent or he does not take any undue advantage of his position. He cannot be said in a case like this to be contracting with himself. He has really a dual capacity. Similarly, after his succession to the impartible estate, Timma occupied two capacities and was in possession of two kinds of property. He was a mortgagee to start with and became a representative of his mortgagor independently of his will. Moreover his personal property, even if it was not ancestral, would devolve on his widow and other heirs in accordance with the rules of Mitakshara while the impartible estate would not be taken by his heirs but by one who would be entitled to succeed in accordance with the rules of lineal primogeniture. To such a case, decisions in *Vallabhdas Mulji* v. *Pranshanker Narbeshankar*[1], *Henderson* v. *Astwood*[2], *Boyce* v. *Edbrooke*[3] and *Farrar* v. *Farrars, Ltd.*[4], would have no application. In the first case, (*i.e. Vallabhdas Mulji* v. *Pranshanker Narbeshankar*[1]), certain mortgagees, who were authorised by their mortgage deeds to sell the mortgaged property on default by the mortgagor, sold it by auction to a benamidar or a trustee for themselves and it was held that the transaction did not affect the relations between the mortgagor and the mortgagees and the sale was void and unenforceable. This case was so decided as first of all the mortgagees were held to have been merely authorised to sell the property and not to purchase it themselves which if allowed would have put them in a position where there would have been a conflict of duty and interest (their duty being to sell to the best advantage of the mortgagor and their interest being to purchase to the best advantage for themselves) and secondly as the mortgagees' capacities were not different and continued to

1. A.I.R. 1929 Bom. 24.
2. (1894) A.C. 150.
3. (1903) 1 Ch.D. 836.
4. (1888) 40 Ch.D. 395.

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remain the same throughout. They worked as mortgagees all along and could not sell the property to themselves.

The second case is that of *Henderson* v. *Astwood.*[1] The facts of this case were that Miss Astwood conveyed her property in a wharf at Kingston known as Astwood Wharf to one Davies by way of a mortgage. The deed contained a power of sale in the event of interest being in arrears. After a notice by Davies the mortgaged premises were put to auction and purchased by one Cobbold, who was the son-in-law of Davies, the mortgagee. Cobbold was acting on behalf of Davies and no money had passed. Davies, however, executed a conveyance to Cobbold who in his turn signed an undertaking at the same time to convey the property to Davies when called upon to do so. After the auction Davies treated himself to be the owner. He remained in possession, improved the property and carried on business in his own name and on his own behalf. Davies subsequently agreed to sell Astwood Wharf to the defendant Henderson. In regard to the auction sale that was held at Davies' instance, Lord Macnaghten in delivering the judgment of their Lordships of the Privy Council observed as follows:

"The so-called sale was of course inoperative. A man cannot contract with himself. A man cannot sell to himself, either in his own person or in the person of another. But such a transaction is not necessarily a fraud or evidence of fraud."

Learned counsel for the respondent has relied on this passage. The main facts of the case are very similar to those in *Vallabhdas Muljee* v. *Premshankar*[2]. The mortgagee in this case also acted in one capacity throughout and having been authorised to sell in certain circumstances sold the property really to himself. This case would not be an authority for the proposition that the representative of a mortgagor would not be, after he came to occupy that position, competent to renew a mortgage or execute a conveyance in favour of the representative of a mortgagee who had held a mortgage before he came to occupy the position of the mortgagor's representative. It is unnecessary for us to go into the cases covered by S. 101 of the Transfer of Property Act again. But independently of S. 101, these cases do not seem to be any authority for the proposition contended for.

The third case is that of *Boyce* v. *Edbrooke.*[3] In this case a tenant for life had granted lease of premises consisting of a dwelling house and a soda water factory to himself, his son and a stranger. In holding that such a covenant was bad in law, Farwell, J., observed at page 843 as follows:

"Then there only remains the last point, which is one of very considerable interest. If there is one doctrine better settled than another in a Court of Equity it is that a man shall not put himself in such a position that his interest conflicts with his duty. A man cannot be both buyer and seller, or lessor and lessee. Now to that principle there is said to be one exception, *that under powers of leasing, the donee of the power can lease to a trustee for himself.* Assume that it is so. It is a perfect anomaly. It

1. (1894) A.C. 150.
2. A.I.R. 1929 Bom. 24.
3. (1903) 1 Ch.D. 836.

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is an exception which owes its existence to authority, and not, with all respect, to common sense. There is no possible ground for it that I can see, and I should decline to extend it one hair's breadth. But it is clear to my mind that there is no authortiy, and no ground for saying, that the donee of a power of leasing could lease to himself, either alone or jointly that he can lease to a trustee; that must be because you get a perfectly

that he can lease to a trustee; that must be beceause you get a perfectly
good contract at law, with covenants at law which can be sued upon and recovered on; and it may be that the fact that the trustee has a right to indemnity over against the lessor may be disregarded. However that may be, there is no authority to show that the donee with a power of leasing can lease to himself, and I am clearly of opinion that he cannot''.

Here, as in *Dulhin Lachhanbati Kumari* v. *Both Nath Tiwari*,[1] it was assumed that the lease could have been possible with the interposition of a trustee. Is Chinnamma Rao's position in the present case not that of a trustee? If it is, and we are of opinion that it is not different from that of a trustee, there would be no difficulty in holding that the general principle stated in *Boyce* v. *Edbrooke*,[2] has no application to the present case.

The last case brought to our notice in this connection was that of *Farrar* v. *Farrars, Ltd.*[3] The facts of this case were that a sale was made by certain mortgagees under powers to sell for an incorporated company Farrars, Ltd. It was impeached on two grounds, the first of which is not relevant in this case. But the second was that the defendant John Riley Farrar, who was one of the three mortgagees was personally interested in the purchase being at the time of the sale the holder of crtain shares in the company. The sale was not set aside by Chitty, J., and on appeal being preferred Lindley, L.J., observed as follows:

"A sale by a person to himself is no sale at all and a power of sale does not authorise the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property".

Then follow the words on which particular reliance was placed by Mr. Narasimhachar:

"Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction''.

Relying on these words, learned counsel for the respondent contended that the interposition of Chinnamma Rao in this case would not affect the substance of the transaction although it might have helped him in getting over the difficulty so far as the form was concerned. We must, however, remember that in this case Lindley, L.J., was, if we understand him correctly, laying down the rule that the interposition of a trustee would not affect the substance of the transaction as he was of opinion that the power of sale did not originally authorise the donee of the power to take the property himself and that he could not be permitted to get round the want of authority and thus commit a breach of faith by employing an intermediary or a trustee and thus achieve the object which he could not otherwise have. This would not be so in the present case. There can be no breach of faith and no

1. A.I.R. 1922 P.C. 94: L.R. 48 I.A. 485 (P.C.).
2. (1903) 1 Ch.D. 836.
3. (1888) 40 Ch.D. 395.

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conflict of interest and duty in the present case. Moreover, Lindley, L. J., observed a little later in that case as follows:

"A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty."

This would show the distinction pointed out by the noble Lord between the mortgagee with a power of sale who was not permitted to employ a trustee to carry out a fraud or breach of faith and do what he was not authorised to do by the contract, that is, to purchase the property himself and the trustee for sale (or for mortgage as Chinnamma Rao was) who has no business to place himself in such a position as to give rise to a conflict of interest and duty. By means of the deed of gift Ex. PP-1 Chinnamma Rao was placed in a position to recover the mortgage money due under Ex. F-1, which the mortgagee intended to keep distinct from his other rights to which he had become subsequently entitled on account of Akkappa's death. There was nothing in that transfer to Chinnamma Rao to which exception could be taken on any known principle of law.

If we remember that Timma the mortgagee came to occupy a different capacity on his succeeding to the impartible estate of Kalahasti and it was possible for him in one capacity to have rights or duties against or in respect of the capacity to which he succeeded later, the case would not present that difficulty as it seems *prima facie* to do. That a person may have rights in one capacity against himself in another capacity is also clear from the following passage in Salmond's Jurisprudence (9th Edn.) at page 424:

"It often happens that a single human being possesses a double personality. He is one man, but two persons, *unus homo*, it is said, *plures personas sustinet*. In one capacity, or in one right as English lawyers say, he may have legal relations with himself in his other capacity or right. He may contract with himself, or owe money to himself, or transfer property to himself. Every contract, debt, obligation or assignment requires two persons; but those two persons may be the same human being. This double personality exists chiefly in the case of trusteeship. A trustee is, as we have seen, a person in whom the property of another is nominally vested, to the intent that he may represent that other in the management and protection of it. A trustee, therefore, is for many purposes two persons in the eye of the law. In right of his beneficiary he is one person, and in his own right he is another. In the one capacity he may owe money to himself in the other. In the one capacity he may own an encumbrance over property which belongs to himself in the other. He may be his own creditor, or his own landlord; as where a testator appoints one of his creditors as his executor, or makes one of his tenants the trustee of his land. In all such cases, were it not for the recognition of double personality the obligation or encumbrance would be destroyed by merger, *or confusio*, as the Romans called it, for two persons at least are requisite for the existence of a legal relation. No man can in his own right be under any obligation to himself, or own any encumbrance over his own property. *Nulli res sua servit*".

In view of the facts that the mortgage deed Ex. F-1 was not extinguished by merger and was enforceable in 1913, Timma was competent, in our opinion, to make a transfer in favour of his

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wife Chinnamma Rao (although *benami* for himself) and since Chinnamma Rao was a separate person for this purpose, the mortgage Ex. RR by Timma as a holder of the Kalahasti estate and in his capacity of Akkappa's representative cannot be held to be infructuous on the ground that the two capacities of the mortgagor and the mortgagee happened to continue in Timma at one time and can be enforced by the present plaintiff as an heir to Timma the mortgagee, against the person who had purchased the equity of redemption subject to Timma's mortgage.

Mr. Narasimhachar wanted us, towards the end of his arguments, to permit him to argue the question of subrogation and priority—particularly as it was considered by the lower Court in its finding submitted to this Court after the order of remand. This point was being raised on the allegation that a large sum of money was paid by the first, the second and the father of the third defendants to Raja Narasingirji whose original mortgage was prior in point of time (1893) to that taken by Timma in 1899. It was conceded by the learned counsel for the respondent that no such plea was raised either in his client's written statement or in the written statements of those who had purchased the equity of redemption along with the first defendant. He alleged, however, that this question was raised by the fourth defendant in his written statement and an issue (issue 11) was framed for that purpose. It might be stated here that the Raja of Venkatagiri (defendant No. 4) was impleaded as a defendant in the suit as he was admitted by the plaintiff to be a subsequent mortgagee of the property in suit and thus interested in the equity of redemption (plaint paragraph 13). It was alleged on behalf of the first defendant that the money was paid by him, the second defendant and the father of the third defendant to Raja Narasingirji by raising a loan from the Raja of Venkatagiri and that a major portion of this amount has been repaid by them during the pendency of this suit. The plea of priority raised on behalf of the Raja of Venkatagiri was in respect of the transaction covered by Ex. XV, *i.e.*, the mortgage deed executed by the first defendant and his brother in 1919. No such plea was raised on behalf of the defendants 1 to 3. It was apparently not raised as it was considered by them that the Raja of Venkatagiri who had advanced the whole of the money which went to pay off Raja Narasingirji had raised it himself. It may be that these defendants paid a little over four lakhs of rupees to the Raja of Venkatagiri or his heirs subsequently and a balance of about Rs. 1,50,000 only or thereabouts remained to be paid to them in respect of the mortgage Ex. XV. But we cannot forget the fact that when the case was remanded by the High Court in 1938, the defendants were permitted to put in additional written statements and although they had by then according to their allegations paid large sums of money to the Raja of Venkatagiri or his heirs who appear to have instituted a suit against them separately yet they failed to raise any plea of subrogation or priority. While the case was proceeding, a compromise was arrived at between the plaintiff and the Raja of Venkatagiri's heirs under which the plaintiff accepted or conceded that they (*i.e.* the Raja

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of Venkatagiri's heirs) would have priority for the sum actually due to them and agreed in addition to forego his own (*i.e.* the plaintiff's) rights to recover any money from some 32 villages which the Raja of Venkatagiri's heirs had purchased from these defendants. This was done while the defendants were present in Court and without any objection or demur on their behalf. This would mean that the plaintiff was permitted to change his position to his detriment in consequence of his compromise with the defendants 8 to 10 and nothing was said on behalf of the defendants (1—3), which may have led the plaintiffs to think that any such plea would be raised on their behalf subsequently. The compromise cannot now be annulled and the Raja of Venkatagiri has not naturally after the compromise taken care to be represented before us. We fail to see how the lower Court in view of these facts, could permit the defendants 1 to 3 to take advantage of the issue framed in consequence of the objection raised by the Raja of Venkatagiri. But this the Court happened to do. After hearing his arguments, we told Mr. Narasimhachar that the lower Court was not, in our opinion, justified to permit his client to take advantage of the 11th issue and he might, if he was so advised, make an application for an amendment of his written statement. This application was made by him and was rejected by us for the reasons which we have mentioned in our order on C.M.P. No. 3448 of 1940. Even after his petition was rejected, Mr. Narasimhachar wanted us to decide the question whether the attitude taken up by the trial Court, in this connection, was correct. We have already stated our reasons for holding that it was not so and we say so in this judgment in accordance with the learned counsel's wishes.

The only question that now remains to be disposed of is that of payments. The lower Court has, while disposing of issue No. 19 held that payments were made by the first defendant to the extent of Rs. 2,650. It did not apparently read the entire documents Ex. XVI and XVIII or it would not have fallen into this error. The payment referred to in Ex. XVI towards the mortgage was for Rs. 1,100 and not for Rs. 1,450. Similarly the payment referred to in Ex. XVIII was for Rs. 800 and not for Rs. 1,200. This would reduce the amount of Rs. 2,650 to Rs. 1,900 only.

As to the payment by the second defendant to Rangamma, the matter has been discussed by the trial Court under issue No. 8. Chinnamma Rao was the mortgagee under Ex. RR and even if the mortgage Ex. RR was *benami* as we have found it to be, she was still entitled to represent Timma and give a complete discharge. After Chinnamma Rao's death, Rangamma would be her heir and was entitled to do the same. The second defendant was, therefore, justified in making a payment of Rs. 8,000 to her. It may be that the plaintiff is entitled to recover this amount from Rangamma or her heir in requisite proceedings; but so far as the second defendant is concerned, it would not be possible for the plaintiff to make him liable for the same amount twice over. The defendants are, therefore, entitled to receive a credit for this amount. The receipt Ex. II acknowledging this pay-

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ment is, however, an unregistered document and could not effect the release of the second defendant's share from the mortgage without registration which it purports to do. The second defendant is not thus legally entitled to ask for a release of his share and this his learned counsel conceded before us. What he urged was that the plaintiff should be in the event of a decree being passed in his favour, directed first to proceed against the share of the defendants 1 and 3 and to proceed against the share of the second defendant only if any portion of his decree remained unsatisfied. This request was not opposed by the other contesting defendants except to a small extent on behalf of the third defendant, who made a similar prayer in regard to the property which appears to have fallen to his share in some private partition. We propose to consider these prayers towards the end of this judgment.

As for the sum of Rs. 21,045 the respondents' contention was that a credit for the amount should be granted to him. The details for this amount are to be found in paragraph 10 of the amended written statement of the first defendant. These payments were alleged to have been received by Timma long before he executed the deed of gift or Ex. RR and we agree with the lower Court that these items must have been taken into consideration by Timma before he executed the mortgage Ex. RR. If interest was calculated in accordance with the terms of the mortgage deed, it would have come to much more and this shows that these payments must have been taken by Timma into account.

As for the sum of Rs. 12,283-5-10, the details of which are also given in the same paragraph of the same written statement, we find that the matter was discussed by the trial Court in paragraphs 58 to 61 of its judgment. These amounts appear to have been paid to Timma and the only reasons which the lower Court has given to disallow them to the defendants are that they could not have been appopriated towards Ex. RR and that Ex. RR cannot be re-opened now at the instance of the defendants. The defendants were no parties to Ex. RR and if any payments were made by them which were not taken into account, they would be entitled to get that done. We must, therefore, allow these items (of a total of Rs. 12,283-5-10) mentioned in paragraph 10 of the amended written statement of the first defendant and hold that they were received on the dates stated therein.

The plaintiff has produced Ex. KKK which would show that if the sum of Rs. 12,283-5-10, be given credit to the defendants on the dates on which the various items comprising this amount were received by Timma, a sum of Rs. 1,09,898-2-0 would be due in January, 1913, in respect of Ex. F-1 and not the sum of Rs. 1,13,630 as represented by Exs. QQ and RR. Since Ex. QQ was a usufructuary mortgage for a sum of Rs. 50,000 only, the balance in regard to Ex. RR would have to be taken, as shown in Ex. KKK to be Rs. 59,898-2-0 on the 2nd January, 1913, instead of the sum of Rs. 63,630, which is to be found in Ex. RR. Mr. Narasimhachar's contention that Timma must be presumed to have foregone a sum of Rs. 11,000 independently of these items did not appeal to us. If these items were not to be taken into

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consideration, something like Rs. 1,24,000 would have been due on the 2nd January, 1913, in respect of Ex. F-1 while according to Timma's accounts it came to a sum of Rs. 1,13,898. The difference between this amount and the amount of Rs. 1,09,898-2-0 appears to have been mainly due to the calculation of interest from the dates on which these amounts were received. We have no reason to assume Timma's generosity in relinquishing an amount of something like Rs. 12,000 on the one hand and dishonesty in refusing to allow credit to the items of Rs. Rs. 12,283-5-10 received by him on the other. We are prepared to do neither and must therefore agree with the account given in Ex. KKK and hold that Ex. RR should have been for Rs. 59,898-2-0 only and not for Rs. 63,630.

As for the requests made on behalf of the second and the third defendants that their shares of the properties which have been allotted to them in some private partition or compromise may be sold only if the decree passed in favour of the plaintiff remains unsatisfied from the properties which have fallen to the first defendant's share, since no objection has been raised to this on behalf of the first defendant there appears to be no objection to accede to these prayers so far as the defendants *inter se* are concerned but the plaintiff was no party to any arrangement and it is only equitable that the order should not affect him adversely. We would, therefore order that in realising his decree the plaintiff shall proceed against the properties allotted to the first defendant and it is only when he finds that the whole of the decretal amount would not be realised from out of the mortgaged properties which have fallen to the first defendant's share that he may proceed against the other properties which have been allotted to the second and third defendants. It does not, however, mean that if any dilatory tactics are adopted by or on behalf of the first defendant that the plaintiff would be disabled from proceeding against the properties which have fallen to the shares of the second and third defendants. We have acceded to the prayers made on behalf of the second and the third defendants purely for the sake of convenience; but if the plaintiff finds that he is being inconvenienced by these conditions, he would be entitled to proceed against their properties simultaneously with those of the properties belonging to the first defendant as well. As between the second and the third defendant, the plaintiff may, subject to what we have said, proceed against the properties which have fallen to the second defendant's share before he proceeds against the properties belonging to the third defendant. Learned counsel for the second defendant was agreeable to this course.

For the foregoing reasons, the decree passed by the trial Court, and the finding on the issues after remand are vacated and a preliminary decree is passed in favour of the plaintiff with costs of this and the trial Court both before and after remand. We have already observed the amount due under Ex. RR would be taken to be Rs. 59,898-2-0 and not Rs. 63,630. The plaintiff would be entitled to the contractual rate of interest up to the time of this decree and to 6 per cent. from the date of the decree up to the date of realisation. Time for payment 6 months.

The compromise arrived at between the plaintiff and the defendants 8 to 10 may be recorded and embodied in the decree.

The long pendency of this appeal from 1931 to 1938 has attracted our serious attention and we have felt compelled to have the matter closely examined with a view to prevent similar delays in future.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE KING.

Meer Shaffi Sahib .. *Appellant.** (*Respondent*).

v.

Abdul Kharim and others .. *Respondents.* (*Petitioners*).

Civil Procedure Code (V of 1908), *O.* 22, *r.* 6 *and O.* 21, *r.* 92—*Application for setting aside sale—Death of judgment-debtor after the hearing but before judgment—Dismissal of application and confirmation of sale—Validity—Applicability of O.* 22, *r.* 6 *to execution proceedings.*

There was an application by a judgment-debtor to set aside a sale in execution and after the arguments were heard and judgment reserved the debtor died. The judgment was delivered dismissing the application to set aside the sale and confirming the sale. On appeal,

Held, O. 22, r. 12 of the Code of Civil Procedure shows that O. 22, r. 6 will apply to proceedings in execution as well as to suits and therefore there can be no abatement by reason of the death of a party between the conclusion of the hearing and the pronouncement of the judgment. The order refusing to set aside the sale is valid and an order confirming the sale is a necessary corollary of the order dismissing the application to set aside the sale. Though there may be separate applications for setting aside the sale and confirming the sale, both the petitions being argued together the provisions of O. 22, r. 6 must apply to the final order in both the applications.

Appeal against the decree of the Court of the Subordinate Judge of Bapatla, dated 11th April, 1940 and passed in A.S. No. 223 of 1939 (in E.A. No. 837 of 1939, in O.S. No. 429 of 1933 on the file of the District Munsif of Bapatla).

K. Krishnamurthi for Appellant.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The main question involved in this appeal is whether an order of the District Munsif of Tenali, dated the 31st December, 1938 confirming a sale held in execution is void or not. The respondents who are the legal representatives of the judgment-debtor stated that the order was void because it was passed after the death of their father and without their having been impleaded in the execution petition. On the other hand, the decree-holder who appeals argues that the provisions of O. 22, r. 6 of the Code of Civil Procedure read with the provisions of O. 21, r. 92 justify the order confirming the sale even though the respondents' father was dead at the time it was passed. It seems to me that this contention of the appellant is bound to prevail.

The facts are that there was an application by the respondents' father to set aside the sale and that application came up for arguments before the District Munsif in October, 1938 when the appli-

*A.A.A.O. No. 185 of 1940. 10th March, 1942.

Meer Shaffi Sahib *v.* Abdul Kharim.

cant was still alive. Arguments were heard and judgment was reserved and judgment was not delivered dismissing the application to set aside the sale until 31st December. Order 22, r. 6 provides that a suit shall not abate by reason of the death of a party between the conclusion of the hearing and the pronouncing of the judgment, and O. 22, r. 12 shows that r. 6 in O. 22 will apply to proceedings in execution as well as to suits. The order therefore refusing to set aside the sale is valid by the provisions of r. 6 of O. 22. Rule 92 of O. 21 provides that where an application under r. 90 is disallowed, the Court shall make an order confirming the sale. An order confirming the sale is therefore a necessary corollary of an order refusing to set it aside. The learned Subordinate Judge in the order now appealed against has carefully differentiated between an order refusing to set aside a sale and an order confirming a sale as if they were separate and were orders necessarily to be passed upon separate proceedings. It seems to me impossible to uphold any such distinction, and even if it were granted for technical reasons that there were separate applications to be dealt with by the Court in connection with deciding whether to set aside a sale or not and passing an order confirming a sale, it would still necessarily follow that when arguments were being heard, both the petitions were being argued and therefore the provisions of O. 22, r. 6 must apply to the final order in both the petitions. It would be an absurd position if an order refusing to set aside a sale is declared valid and an order confirming a sale should be declared void when the subject-matter of both the orders is essentially the same and the arguments in both the orders are the same. For these reasons I am of opinion that the view of the learned District Munsif in this case is to be preferred to the view of the learned Subordinate Judge and the order of the District Munsif of Tenali confirming the sale is not void.

In the result the application which has given rise to this appeal must necessarily be dismissed. The appeal is allowed and the respondents' application dismissed with costs throughout.

K. S. ——— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE SOMAYYA.

Pothuru Sreeramulu Chetti and another .. *Appellants**

v.

Duvvuru Subbarami Reddi and others .. *Respondents.*

F.B. — Sreeramulu Chetti *v.* Subbarami Reddi.

Hindu law—Brothers in a joint family makers of a promissory note—Suit upon promissory note—Sons also impleaded—Attachment before decree—Adjudication of father in insolvency—Sale of sons' interests—Rateable distribution among family creditors of sale proceeds—Purchaser's suit for partition of sons' interests in family properties—Condition imposed upon decree-holder to pay other creditors of the family—Whether condition in circumstances of the case right.

The makers of a promissory note, two brothers, were sued along with their respective sons on the note. The suit was decreed against the makers of the note personally and against their sons, limited so far as the latter

*S.A. Nos. 57 and 58 of 1939. 4th March, 1942.

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were concerned to their interests in the family properties. An order of attachment before judgment of the properties in suit was obtained. A year later, the brothers applied for their own adjudication as insolvents and got an order of adjudication. The decree-holder tried to implead in execution proceedings, the Official Receiver as representative of the makers of the pro-note, but this was refused. He was therefore compelled to limit his application for execution to the interests of the sons in the properties attached. The sons' interests, in some of the items were sold and purchased by the decree-holder and another. When the proceeds of sale were paid into Court they were distributed to the decree-holder and to five other creditors rateably. The purchasers thereafter filed suits individually for partition of the shares of the sons in the properties in the hands of the Receiver. On the question whether they were entitled to such shares subject only to liability for payment of the remaining debts of the family,

Held, that the normal rule was that a person who had acquired the interest of a member of a joint family in the family properties should, when he wishes to enforce his rights, institute a suit for partition of all the assets, and the value of the share acquired will be only arrived at after making provision for payment of all the family debts. But in view of the special circumstances in the case, namely, that the proceeds of the sale of the shares of the sons in the properties concerned had been already paid to creditors rateably, the condition imposed in the decree that the purchasers can take the sons' share subject to the liability for the remaining debts of the family would amount to a direction that the same properties should be sold twice over for the purpose, a position which no Court with the power to apply principles of equity could ever contemplate. It was in consonance with both natural justice and the spirit of Hindu law to hold that a sale for the satisfaction of family debts was capable of conveying to the purchaser a good title in such circumstances, as in this case. The diligent creditors had already received their shares from the proceeds when the sons' interests in the properties were sold in order to meet family liabilities and hence no justification existed for the condition imposed in the later decree. The creditors still unpaid, can resort to the sale proceeds of the interests of the father in the properties in the hands of the Official Receiver.

Appeal against the decrees of the District Court of Nellore in A.S. No. 184 and 183 of 1937 preferred against the decrees of the Court of the Subordinate Judge of Nellore in O.S. Nos. 52 and 70 of 1936 respectively.

V. Govindarajachari and *N. Vasudeva Rao* for Appellants.

K. Kuppuswami for *Respondents.*

The Court delivered the following

JUDGMENT.—These second appeals have been placed before a Full Bench for decision because they raise a question of Hindu law of some importance and there is no textual or other authority having any bearing.

On the 7th September, 1931, Seshayya Chetti, the appellant in S.A. No. 58 of 1939 filed a suit in the Court of the District Judge of Nellore to recover an amount claimed by him to be due on a promissory note. The promissory note had been executed by the first respondent and his brother Rami Reddi, who is now dead and is represented by his sons, the second, third and fourth respondents. The defendants to the suit were the makers of the instrument and their respective sons, the family being joint. On the 26th September, 1931 the plaintiff obtained an interim order for attachment before judgment of the properties in suit and the interim order was made absolute on the 11th January, 1932. On the 7th October, 1932 the Court passed a decree for Rs. 3,118 with interest

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and costs against the makers of the promissory note personally and against their sons, limited so far as the sons were concerned to their interests in the family properties. On the 16th November, 1932, the two principal defendants applied for their own adjudication in insolvency, and on the 8th March, 1933 an order of adjudication was passed. On the 2nd May, 1933, the decree-holder asked to be allowed to implead in the execution proceedings the Official Receiver as the representative of the makers of the instrument. The District Judge refused the application on the ground that execution could not be allowed against the Official Receiver. It is regrettable that an arrangement was not made that the interests of all the members in the properties should be sold in the execution proceedings. This could have been done by consent with full safeguard to the creditors of the insolvents; and if such an arrangement had in fact been made the present suits would have been avoided. The result of non-cooperation was that the decree-holder was compelled to limit his application for execution to the interests of the sons in the properties attached. On the 19th October, 1933, the sons' interests in some of the items of the properties were sold by the Court and purchased for Rs. 10,455 by the appellant in Appeal No. 57 of 1939. Their interests in the rest of the properties were sold on the 27th October, 1933 and were purchased by the decree-holder for Rs. 830.

It is common ground that the promissory note sued upon represented moneys borrowed in order to meet a family necessity. After the order of attachment had been passed, five other creditors who had obtained decrees against the family applied for rateable distribution of the proceeds of sale. Again, it is common ground that the debts due to them were debts which were binding on the family. When the proceeds of the sales were paid into Court, they were paid out to the decree-holder and the five other creditors rateably. On the 19th March, 1934, the purchasers of the properties obtained symbolical possession and on the 16th April, 1935, each of them filed a suit for partition of the shares of the sons in these properties. These suits were numbered as O.S. Nos. 52 of 1936 and 70 of 1936, respectively. S.A. No. 57 of 1939 arises out of the first of these suits and S.A. No. 58 of 1939, out of the second. The Subordinate Judge of Nellore, in whose Court the suits were tried, granted to the plaintiffs decrees for partition, but at the same time held that they were only entitled to take the shares of the sons in the properties in suit subject to the payment of other family debts. The total value of the properties held by the family was Rs. 25,000 and the family owed altogether Rs. 40,000. The plaintiffs appealed to the District Judge against the decision of the Subordinate Judge that they were only entitled to the shares of the sons, subject to the liability for payment of the remaining debts of the family but the District Judge concurred in the decision of the Subordinate Judge. The question which this Court is called upon to decide is whether the conditions imposed by the Courts below is sound in law.

Under the Mitakshara law a member of a joint family cannot claim to be given his share in a particular asset of the family.

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The coparceners are entitled to joint possession and there is community of interest. If a member of the family wishes to take his share there must be a partition of the whole estate. In the same way a person who has acquired the interest of a member of a joint family in the family properties must, when he wishes to enforce his rights, institute a suit for partition of all the assets, and the value of the share acquired is, of course, only arrived at after making provision for the payment of the debts of the family. When the plaintiff has obtained a decree for partition and it appears that the value of a particular property does not exceed the net value of the member's share, the Court may direct that the particular property shall be allocated to the plaintiff, but in ordinary circumstances the Court will not go beyond this.

The appellants limited their claim for partition to the sons' interests in the attached properties; and in holding that they were only entitled to take the sons' interests in these properties subject to the sons' liability in respect of other family debts, the Courts below had regard merely to the principles to which reference has just been made. The appellants say, however, that the Subordinate Judge and the District Judge lost sight of an important factor which must be taken into consideration under the peculiar circumstances which we have here. They admit that if the moneys paid into Court had not been utilised for the payment of debts due by the family, they would be compelled to take the sons' interest in the properties in suit subject to the liability for payment of the debts due by the family, but they say that, inasmuch as the sons' interests had already been sold for the payment of family debts, the condition imposed below amounts to a direction that the same properties shall be sold twice over for this purpose, a position which no Court with the power to apply principles of equity could ever contemplate.

We agree, and in doing so we have regard also to the terms of the decree under which the appellants bought the interests of the sons in the properties in suit. By the decree all the sons were directed to pay from their interests in the properties the decretal amount, and therefore under it the decree-holder had the right of bringing to sale the interests of the sons as they then stood. By reason of the sales which took place on the 19th and 27th October, 1933 the value of the sons' interests in the properties was realised and applied in full in the discharge of family debts, a burden which the Courts below would subject them to again. The situation is undoubtedly unique and consequently the Court is called upon to formulate a rule which is in keeping with natural justice and the spirit of Hindu law. We consider that it is in consonance with both to hold that a sale for the satisfaction of family debts is capable of conveying to the purchaser a good title in such circumstances as we have here notwithstanding that other debts equally binding on the family were left unsatisfied. The creditors who had been diligent got their shares of the proceeds when the sons' interests in the properties were sold in order to meet family liabilities and we can see no warrant for the condition which has been attached to the decree obtained by the appellants. The interests of the fathers remain and as these have devolved on the

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Official Receiver he can realise them for the benefit of the creditors who are still unpaid.

For these reasons we hold that the decisions of the Courts below are erroneous and the appeals will be allowed. This means that the appellants will be entitled to a decree for partition free from any condition. It follows that the appellants are entitled to their costs throughout.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE KING.

Hota Veerabadhrayya and another .. *Appellants**
(*Nil and 1st deft.*)

v.

Bolla Bulli Subbarayudu and others .. *Respondents.*
(*Plff. and Defts.*).

Veera-badhrayya
v.
Subbarayudu.

Civil Procedure Code (V of 1908), O. 21, Rr. 58 to 63—Scope—Debt not immediately payable—Attachability—Transfer of Property Act (IV of 1882) S. 55 (5) (b).

By the terms of the sale-deed the consideration amount was retained in the hands of the vendee for the purpose of discharging two debts due to *X*, a creditor of the vendors, under a first mortgage and a promissory note. The property sold was subject also to a second and third mortgage in favour of other creditors which the vendors undertook to discharge. The vendee did not discharge the promissory note debt and *X* accordingly sued to recover it and obtained a decree against the vendors. In execution of that decree *X* attached the debt which he alleged was due from the vendee to the vendors as unpaid purchase money in respect of the sale. The vendee contended that he was under no liability to pay the purchase-money until the vendors had cleared off the second and third mortgages. The executing Court accepting this contention raised the attachment. *X* thereupon filed a suit under O. 21, r. 63, impleading the vendee and his vendors. Meanwhile the vendors transferred their right to receive from the vendee the unpaid purchase money to *Y* who paid off the second and third mortgages and sued the vendor for the money and obtained a decree. *Y* was then impleaded as a supplemental defendant.

Held, that the suit by the attaching creditor does lie under O. 21, Rr. 58 to 63. A debt which is not immediately payable may nevertheless be attachable if it is an obligation already in existence. The right given to the vendee under S. 55 (5) (*b*) of the Transfer of Property Act to postpone the discharge of the obligation does not make the obligation one which is not attachable.

Appeals against the decree of the Court of the Subordinate Judge of Amalapuram in A.S. No. 1 of 1938, preferred against the decree of the Court of the District Munsif of Razole in O.S. No. 188 of 1936.

K. Bhimasankaram, D. Narasaraju and *P. Somasundaram* for Appellants.

V. Govindarajachari for Respondents.

The Court delivered the following

JUDGMENT.—The ultimate transaction which has given rise to these appeals is the sale by defendants 2 to 4 of certain properties to defendant 1 in December, 1929. The consideration of Rs. 2,500 was by the terms of the sale-deed retained in the hands

*S.A. Nos. 315 and 1150 of 1940. 4th March, 1942.

Veerabadhrayya v. Subbarayudu.

of defendant 1 for the purpose of discharging two debts due to plaintiff; one on a first mortgage and the other on a promissory note. The property sold was subject also to a second and a third mortgage. These mortgages the vendors undertook to discharge.

Defendant 1 did not discharge the promissory note debt and plaintiff accordingly sued in 1931 to recover it and obtained decree against defendants 2 to 4. In execution of that decree he attached the debt which he alleged to be due from defendant 1 to defendants 2 to 4 as unpaid purchase-money in respect of the sale. On notice being sent to defendant 1, he denied that any debt was due, contending that he was under no liability to pay the purchase-money until defendants 2 to 4 had cleared off the second and third mortgages. The executing Court accepting this contention raised the attachment on 1st August, 1935. Plaintiff thereupon filed the present suit (O.S. No. 188 of 1936) under O. 21, r. 63 impleading all four defendants. The suit was dismissed by the learned District Munsif of Razole.

Meanwhile in August, 1936, defendants 2 to 4 transferred to defendant 5, their right to receive from defendant 1 the unpaid purchase-money. Defendant 5 in 1937 paid off the second and third mortgages, and then in O.S. No. 23 of 1938, sued defendant 1 for the money, and obtained a decree. The decree, however, did not award him interest from the date of the sale transaction. Against this part of the decree defendant 5 appealed and this appeal (A.S. No. 48|1940), was heard recently by me sitting with Lakshmana Rao, J. We confirmed the decree refusing interest for the whole period until defendant 5 paid off the two mortgages, holding that under S. 55 (5) (*b*) of the Transfer of Property Act, defendant 1 was entitled to retain the purchase-money in his hands.

Plaintiff appealed against the decree of the District Munsif in the present suit. Defendant 5 was impleaded as supplemental respondent. The appeal was allowed. Defendant 5 and defendant 1 have separately filed the two second appeals which I have now heard.

The first point taken for the appellants is that plaintiff's suit was not maintainable. It is argued on the authority of *Butchayya* v. *Krishnamachari*,[1] that when a garnishee denies his liability to the judgment-debtor the question between him and the decree-holder is one which is outside the scope of O. 21, rr. 58 to 63, altogether. It is clear, however, that *Butchayya* v. *Krishnamachari*,[1] does not go so far as this, and recognises that where the "existence of the debt" is admitted by the garnishee these rules apply. The expression "existence of the debt' is ambiguous but I think it must be interpreted to mean "existence of facts from a consideration of which it follows in law that the garnishee is indebted". Here defendant 1 admitted that he had purchased the property and had not paid for it, and in essence claimed only that he was entitled not to refuse payment altogether but only to defer it. I would accordingly hold that plaintiff's suit does lie.

1. (1936) 70 M.L.J. 20: I.L.R. 59 Mad. 966.

Veerabadhrayya v. Subbarayudu.

The question then arises whether in 1935 at the time of the order raising the attachment, defendant 1 was under any immediate obligation to his vendors. The argument for plaintiff is that even though a Bench of this Court may have held that defendant 1 was entitled to retain the purchase-money in his hands this privilege was coupled with a corresponding duty under S. 55 (5) (*b*) to pay it to the mortgagees. As he had not fulfilled this duty for nearly six years, the right of his vendors to receive the purchase-money had been restored. In support of this argument I have been referred to *Raghunatha* v. *Sadagopa*,[1] and *Komukutti* v. *Kumara Menon*,[2] but these are cases which have nothing to do with S. 55 (5) (*b*). They merely lay it down that where a vendee has undertaken to discharge his vendor's debts to simple money creditors and fails to do so within a reasonable time the vendor may sue the vendee directly for the money.

The learned advocates for the appellants do not deny that under S. 55 (5) (*b*), it is the duty of the vendee to pay the money which he retains in his hands to the mortgagees, but they argue that this obligation cannot arise if the sum required to pay off the mortgagees is greater than the amount of the purchase-money. Although the Transfer of Property Act is not specifically referred to in that judgment this principle seems clearly to follow from a judgment of the Privy Council reported in *Muhammad Siddiq Khan* v. *Nasir Ullah Khan*.[3] It is there explicitly laid down that a vendee charged with the obligation of paying off an encumbrancer to a certain extent may defer doing so until the vendor is prepared to contribute the remainder of the sum due to pay him off completely. In 1935, therefore defendant 1 was not compellable to pay anything to the second and third mortgagees unless defendants 2 to 4 joined with him in paying them off—and it follows from this that in 1935 defendants 2 to 4 had no legal claim upon defendant 1 for the amount of the purchase-money.

But this finding does not conclude the matter. A debt which is not immediately payable in 1935, may nevertheless be attachable in 1935, if it is an obligation already in existence. It is argued for the appellants that there was no debt or obligation in existence at any time before 1937, but it seems clear to me that the obligation to pay for the property purchased sprang into being by virtue of the very transaction of sale itself in 1929. The right which is given to the vendee by S. 55 (5) (*b*) is not a right to say that he is under no obligation, but a right to postpone the discharge of that obligation. The cases cited for the appellants, viz., *Haridas Acharjia Chowdhry* v. *Baroda Kishore Acharjia Chowdhry*,[4] *Lachman* v. *Jarbhandan*[5] and *G. D. John* v. *Sambamurthi Ayyar*,[6] are clear cases in which an obligation is not yet

1. (1911) 21 M.L.J. 983: I.L.R. 36 Mad. 348.
2. (1918) 35 M.L.J. 692.
3. (1898) L.R. 26 I.A. 45: I.L.R. 21 All. 223 (P.C.).
4. (1899) I.L.R. 27 Cal. 38.
5. (1927) I.L.R. 50 All. 507.
6. (1928) 56 M.L.J. 299.

Veera-badhrayya *v.* Subbarayudu.

due, and easily therefore distinguishable from the facts of the present case. For these reasons I hold that the obligation in question in this case was a debt attachable in 1935 and these appeals must therefore fail. They are dismissed with costs.

Leave refused.

K.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE KING.

Munnangi Sumitramma .. *Appellant** (*Plaintiff*)

v.

Mudunuru Subbadu and others .. *Respondents* (*Defendants*).

Sumitramma *v.* Subbadu.

Evidence Act (I of 1872), S. 115—Applicability—Objection by defendant to jurisdiction of Revenue Court accepted—Later suit in Civil Court—Defendant not estopped from contesting jurisdiction of Civil Court.

The appellant sued the respondent for arrears of rent originally in the Court of the Deputy Collector before whom the objection was taken that upon the plaint allegations, the appellant had not established that the property formed part of an estate and therefore that no suit lay in the Court of the Deputy Collector. The contention was accepted and the plaint returned for presentation to the proper Court. The appellant then filed his plaint in the Court of the District Munsif. On the question whether the respondents can question the jurisdiction of the Civil Court,

Held, that the respondents were not estopped from contending that the Civil Court had no jurisdiction.

Hemanta Kumari Debi v. *Prasanna Kumar Datta*, (1928) I.L.R. 56 Cal. 584 and *Ram Khalevan Singh* v. *Maharajah of Benares*, A.I.R. 1930 All. 15: 1930 A.L.J. 224, distinguished.

Estoppel consists not in putting forward a particular view of the law but in making a particular representation on a point of fact.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in A.S. No. 17 of 1940 (O.S. No. 28 of 1938, District Munsif's Court, Gudivada).

V. Suryanarayana for Appellant.

K. Kuppuswami for Respondent.

The Court delivered the following

JUDGMENT.—The appellant is the owner of about 15 acres of land in the village of Paidemukkala Agraharam Chellapalli taluk of the Kistna District. He sued the respondents for arrears of rent originally in the Court of the Deputy Collector of the Nuzvid Division. When that suit was filed, the respondents took the objection that, upon the allegations in the plaint, the appellant had not established that the property formed part of an estate and therefore that no suit lay in the Court of the Deputy Collector. The Deputy Collector accepted this contention and passed an order returning the plaint for presentation to the proper Court. The appellant accordingly filed his plaint in the Court of the District Munsif of Gudivada who gave him a decree for the greater portion of the amount claimed. There was then an appeal by the defendants to the learned Subordinate Judge of Masulipatam who held that the Civil Court had no jurisdiction to entertain the suit on the ground that the appellant had not made out that the land on which

* A.A.O. No. 410 of 1940. 9th March, 1942.

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v.
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the rent was due was not a portion of an estate. Against this decision of the learned Subordinate Judge the present appeal has been filed.

The first point argued in favour of the appeal is that the respondents were estopped from contending that the Civil Court had no jurisdiction. My attention has been called to certain rulings—*Hemanta Kumari Devi* v. *Prasanna Kumar Datta*,[1] and *Ram Khalevan Singh* v. *Maharajah of Benares*,[2] in which it is laid down that when a party objects to the jurisdiction of one Court and procures an adjudication in his favour on that point and the plaint is thereupon filed in another Court, he is estopped from putting forward a contrary view of the question of jurisdiction to the one already taken. It seems to me that there could be no question of estoppel in this case at all. It will be obvious from a consideration of S. 115 of the Evidence Act that estoppel consists, not in putting forward a particular view of the law, but in making a particular representation on a point of fact. It is only when there has been one representation on a question of fact that a party is estopped from putting forward a contrary representation on the same question of fact. That has quite clearly not been done in the present case. All that was asserted at the trial before the Deputy Collector was that on the recitals of the plaint itself, the suit would not lie in that Court. In other words, any representations which were made to the Court were made, not by the defendants, but by the plaintiff and it is impossible to argue that, whatever point of law the defendants might have put forward, they can be prevented from putting forward, representations of fact for the first time when the plaint was actually filed in the Civil Court. There can be no doubt therefore that the plea of estoppel must fail.

The next question is whether the learned Subordinate Judge is right in holding that the burden of proof in this case lay upon the plaintiff. It is argued for the plaintiff-appellant that the original burden of proof certainly lay upon the defendants. The plaintiff has brought a suit in the Civil Court and if any one chooses to assert that a Civil Court has no jurisdiction to try any suit, the burden of proof lies upon that person to establish his assertion. That is no doubt true; but the argument for the defendants is that the original burden which lay upon them has been in part discharged by stressing the common feature of this case that the lands in question are situated in Paidemukkala Agraharam. The word *Agraharam* naturally indicates that the village of Paidemukkala is an inam village, and if it be once conceded that Paidemukkala Agraharam is an inam village, S. 23 of the Madras Estates Land Act as it now stands throws the burden upon the plaintiff. The only evidence in the case of any value is Ex. V. This is a certified copy of a register of inams in the village of Paidemukkala Agraharam. It shows that certain inams extending over 594 acres and 83 cents were enfranchised in the names of certain persons who were con-

1. (1928) I.L.R. 56 Cal. 584.
2. A.I.R. 1930 All. 15: 1930 A.L.J. 224.

nected by relationship with the original grantee of the Agraharam and it also shows that there was an extent of 243 acres and 8 cents in the enjoyment of inamdars which was not enfranchised. It is argued for the appellant that the significance of this document is to show that, when the Agraharam was granted, it consisted only of the 594 acres, and that the other 243 acres must have been granted at some previous time. If that be so, the grant of the Agraharam would not be the grant of the whole village and the definition of "Estate" contained in S. 3 (2) (*d*) would not apply. It seems to me impossible to accept this contention. There is nothing in any of the columns of Ex. V, or in any of the notes made by the Deputy Collector to suggest that the whole village was not granted as Agraharam and that the separate inams did not come into existence at some time after the original grant. In these circumstances, and bearing in mind the probability that the use of the word *Agraharam* in the title of the village suggests that it must have been the whole village which was originally granted, it seems to me that S. 23 of the Estates Land Act must be applied to this case, and it must be held that the burden lies upon the appellant to show that the 15 acres of which he claims ownership are situated, not amongst the enfranchised inams shown in Ex. V, but amongst the minor inams which can be excluded from the estate. It is of course obvious that this burden has not been discharged because, as I have already indicated, there is no positive evidence of title apart from Ex. V.

The result is that the appeal must fail and is dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Karingamanna Melathil Karnavan Rama Kurup and another .. *Petitioners**

v.

Thirunavaya Kalathil Veettil's children Kunhipathumma and others .. *Respondents.*

Rama Kurup v. Kunhipathumma.

Civil Procedure Code (V of 1908), O. 7, r. 10 read with Ss. 107 (2) and 141—Applicability—Memo. of civil revision petition in High Court—If can be returned for presentation as appeal to District Court.

A prayer for the return of a memo. of civil revision petition for presentation to the District Court as an appeal, on the ground that an appeal to such court lies cannot be allowed. The provisions of O. 7, r. 10. read with Ss. 107 (2) and 141 of the Code of Civil Procedure are not applicable to such a case.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Munsif of Tirur, dated 9th December, 1940 and made in O.P. No. 135 of 1940, etc.

P. Govinda Menon for Petitioners.

N. R. Sesha Aiyar for Respondents.

The Court delivered the following

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* C.R.P. No. 873 of 1941 and C.M.P. No. 1519 of 1942. 19th March, 1942.

Rama Kurup v. Kunhipathumma.

JUDGMENT.—The petitioner asks for return of the memo. of Civil Revision Petition for presentation to the District Court as an appeal as in view of the decision in *Venkayya* v. *Pullayya*,[1] an appeal lies in a case like this to the District Court and the Civil Revision Petition is therefore incompetent. Mr. Govinda Menon for the petitioners relies on the provision of O. 7, r. 10 read with Ss. 107 (2) and 141 of the Code of Civil Procedure as supporting the prayer. I do not consider that these provisions are applicable to the case as revisional jurisdiction is peculiar to this Court and there can be no question of returning the Civil Revision Petition for presentation as a Civil Revision Petition to any other Court in the province. The prayer cannot therefore be allowed. There can be no objection to the return to the petitioner of the enclosures he has filed and they will accordingly be returned.

The Civil Revision Petition is dismissed with costs.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Sri Raja Manyam Kanakayya Garu .. *Petitioner** (*Respt.*)

v.

Sriman Mudumba Venkata Ranga Anaharacharyulu Garu .. *Respondent* (*Petr.*).

Kanakayya Garu v. Anaharacharyulu Garu.

Madras Agriculturists' Relief Act (IV of 1938), S. 15 (4)—Contract of tenure—Provisions for abatement of rent—Court's jurisdiction to enter into question of abatement of rent due from tenant to landlord.

On the question whether in an application under S. 15 (4) of Act IV of 1938, the Court has jurisdiction to go into the question of the tenant's right to any abatement of rent for non-possession of part of lands in his holding or whether he was entitled to any such abatement of rent for failure of irrigation supply,

Held, that, though such a plea would not in an ordinary case be available to the tenant in an application under S. 15 (4), as in the case under consideration the agricultural tenure was itself based upon a contract that provided for such abatement of rent the Court will have jurisdiction to consider contentions based upon the clauses in the patta which contemplated fluctuations on certain grounds.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Special Assistant Agent, Bhadrachalam, dated 30th March, 1939 and made in M.A.R.A. No. 1 of 1939 and also the interlocutory order in R.M.P. No. 1 of 1939 filed in the said M.A.R.A. No. 1 of 1939.

M. Appa Rao for Petitioner.

K. Krishnaswami Aiyangar and *A. Seshachari* for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner is a landholder against whom an application was preferred under S. 15 of Act IV of 1938. The main contention in revision is that the lower Court had no jurisdiction in an application under S. 15 (4) of the Act to go into the

1. (1942) 1 M.L.J. 390.

* C.R.P. No. 2089 of 1939. 20th March, 1942.

Kanakayya Garu v. Anaharacharyulu Garu.

question whether the applicant was entitled to any abatement of rent for non-possession of part of the lands in his holding or whether the applicant was entitled to any abatement of rent for failure of irrigation supply. The contention now put forward in revision is that the enquiry under S. 15 (4) must be confined to ascertaining what is the figure of rent according to the patta and whether that figure has been paid and that the Court is not entitled to go into subsidiary questions affecting liability for rent. No doubt in an ordinary case it would not be open to the Court under S. 15 (4) to entertain a plea which amounted in substance to an attempt to reduce the rent from that previously payable or even to entertain a plea which amounted to an attempt to repudiate liability for rent on the ground that irrigation works had not been repaired. Such pleas would not be available to the tenant in an ordinary suit for rent under the Madras Estates Land Act and therefore could not be urged in an application under S. 15 (4) of Act IV of 1938. But to the extent to which there are contentions open to the tenant affecting the amount of rent payable, the Court dealing with an application under S. 15 (4) necessarily has to go into those contentions in order to find out what is the amount of rent. The present case is peculiar in that the contract upon which the tenure is based itself provides for an abatement of rent in case there is any shortage in the extent in the possession of the tenant and for an abatement of rent in case there is any deficiency in the supply of water by the landholder to the tenant's holding. In the face of such clauses in the original patta it cannot be contended that the Court which has to decide what is the amount of rent can shut out contentions based on these clauses in the patta which contemplates fluctuations on certain grounds. There is nothing else in the revision petition which can be considered under S. 115 of the Code of Civil Procedure. The petition is therefore dismissed with costs.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Allipuram Subbiah .. *Petitioner** (*Accused*)

v.

Bojja Venkata Subbamma .. *Respondent* (*Complainant*).

Subbiah v. Venkata Subbamma.

Indian Penal Code (Act XLV of 1860), S. 504—Offence of using bad language—Magistrate not considering whether there was intention to provoke breach of peace—Conviction under S. 504 not proper—Procedure in such trial.

S. 504, Indian Penal Code is intended to deal with persons who are as responsible for breaches of peace or the commission of offences as those who openly abet or incite them. It will be a misuse of the section to punish filthy abuse without discussing whether such abuse was intended to provoke a breach of the peace or the commission of an offence or whether the accused knew that it was likely that such provocation would cause a breach of the peace.

The offence punishable under S. 504 can be tried by the summary procedure, but the rules laid down for the trial of warrant cases must be adopted

* Crl.R.C. No. 47 of 1942. 26th March, 1942.
(Crl.R.P. No. 43 of 1942).

Subbiah *v.* Venka Subbamma.

in the absence of any rules under the summary procedure chapter modifying it. Failure to ask the accused to state at the commencement of the hearing of the case whether he wishes to cross-examine, and, if so, which of the prosecution witnesses whose evidence has been taken, is a serious irregularity.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Bench of Magistrates, Nellore Town in S.C. No. 843 of 1941.

K. Umamaheswaram for Petitioner.

K. R. Vepa for *P. V. Rajamannar* and *K. Subba Rao* for Respondent.

N. Somasundaram for Public Prosecutor for the Crown.

The Court made the following

ORDER.—The petitioner was convicted by the First Class Bench Magistrate's Court of Nellore Town of an offence punishable under S. 504, Indian Penal Code and sentenced to pay a fine of Rs. 10 in default to a week's simple imprisonment.

This case is a very good example of the way in which S. 504, Indian Penal Code, is misused. The offence contemplated in S. 504 is a serious one, as is indicated by the fact that it is made punishable with a term of two years' rigorous imprisonment. It is obviously intended to deal with persons who are as responsible for breaches of peace or the commission of offences as those who openly abet or incite them. Despite this, S. 504, Indian Penal Code is being constantly used by Courts of Summary Jurisdiction and by the lower Magistracy to express their disapproval by the imposition of a fine of the use of bad language. I have never seen in the numerous cases that have come before me any sentence more serious than a fine of a few rupees. The case under consideration illustrates the misuse of this section very well. The complaint against the accused was under S. 352, Indian Penal Code, a petty offence that is punishable only up to three months' rigorous imprisonment. The Court disbelieved part of the prosecution case and found that the alleged assault was not true and that something less than an assault had taken place. The residuary offence, after taking away the greater part of this petty offence of assault, was a serious offence under S. 504, Indian Penal Code, punishable with two years' rigorous imprisonment. That the learned Magistrates did not realise the nature of the offence punishable under S. 504, Indian Penal Code, is made clear by the fact that they have nowhere discussed whether the insults of the petitioner were intended to provoke a breach of the peace or the commission of an offence, or whether the petitioner knew that it was likely that such provocation would cause a breach of the peace. The Magistrates evidently thought that an insult—at any rate a gross insult—was an offence in itself. That is not so. What is punished under this section is something very much graver than that. The anomaly of the use of this section for the purpose of punishing filthy abuse is further indicated by the fact that to abuse a rowdy or a bad-tempered person who would be sure to respond with violence is much more likely to be an offence than to abuse a helpless woman.

Subbiah v. Venkata Subbamma.

Another indication that the Magistrates did not realise the nature of the offence with which the accused was charged is the procedure that they adopted. The offence punishable under S. 504, can be tried by the summary procedure; but the rules laid down for the trial of warrant cases must be adopted, unless there are any rules under the summary procedure chapter which modify it. One essential of a warrant trial is that the accused persons should be required to state at the commencement of the next hearing of the case (*i.e.*, a special adjournment has to be given for that purpose) whether he wishes to cross-examine, and if so, which of the witnesses of the prosecution whose evidence has been taken. That too was not done in this case. It has been held that the omission to give proper facilities for further cross-examination is an illegality which vitiates the conviction. Although it is not necessary to go as far as some decisions have gone in this direction, yet the omission is undoubtedly a grave one. That, coupled with the fact that the learned Magistrates did not consider the essential ingredients of S. 504, makes it necessary to set aside the conviction and sentence. It is ordered accordingly. The fine, if paid, will be refunded.

K.C. ——— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Dommarapati Pedda Venkatappa and another .. *Petitioners**
(Accused-Respts.)

v.

Marupuri Latchanna .. *Respondent.*
(Complainant-Applt.).

Venkatappa v. Latchanna.

Criminal Procedure Code (*V of* 1898), *Chapter XXXII—Revisional courts—Giving of reasons for orders—Not obligatory though desirable.*

Chapter XXXII of the Code of Criminal Procedure governing references and revisions says nothing about the giving of reasons for any order passed and it must be taken that the Legislature did not intend to make it obligatory on revisional courts to give reasons for their orders. Nevertheless it is as a rule desirable that reasons should be given so that in exercising its revisional powers the High Court should know what was in the mind of the lower revisional Court when it passed its order.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the Order of the Court of the District Magistrate of Chittoor, dated 5th January, 1942 and made in C.R.P. No. 35 of 1941 (C.C. No. 84 of 1941 on the file of the Court of the joint Magistrate of Madanapalle Division).

A. Bhujanga Rao, M. S. Ramachandra Rao and *D. R. Krishna Rao* for Petitioners.

N. Somasundaram for Respondent.

A. S. Sivakaminathan for Public Prosecutor for the Crown.

The Court made the following

ORDER.—The petitioners were accused of an offence punishable under S. 326, I.P.C., but they were discharged by the

* Crl. R. C. No. 86 of 1942. 26th March, 1942.
(Crl. R. P. No. 79 of 1942.

Venkatappa v. Latchanna.

Joint Magistrate of Madanapalli before whom the case came up for trial. In revision, the District Magistrate of Chittoor set aside the order of discharge saying that "the evidence on record was sufficient to justify the framing of a charge. In view of it, I set aside the lower Court's order of discharge and direct further inquiry into the case." The petitioners have brought the matter before this Court in revision on the ground that the Magistrate's order is irregular, if not illegal, and ought to be set aside on the ground that no reasons are given.

Chapter XXXII of the Code of Criminal Procedure, which governs references and revisions, says nothing about the giving of reasons for any order passed. As in many places in the Code it is required of a Magistrate or Judge that reasons should be given for the order passed, it must be taken that the Legislature did not intend to make it obligatory on revisional Courts to give reasons for their orders. Nevertheless, it is as a rule desirable that reasons should be given, as was pointed out by *Ayling, J.*, in *Thirukonam Kuppachari* v. *Emperor*.[1] I am not prepared to go as far as to say that the fact that no reasons are given is any indication that the Magistrate has not given the matter his full consideration; but sometimes mistakes, even of fact, are made by revisional Courts. In order that this Court should exercise its revisional powers satisfactorily, it is desirable that it should know what was in the mind of the lower revisional Court when it passed its order. As the question involved in these proceedings is however a very simple one, I have no reason to think that the absence of reasons led to any injustice being done to the petitioners.

The petition is dismissed.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE KING.

Avasarala Kamaraju Pantulu and another .. *Appellants** *(Plffs.-Applts.)*

v.

Balla Saramma .. *Respondent (2nd Deft.-Respt.)*.

Kamaraju Pantulu v. Balla Saramma.

Limitation Act (IX of 1908), Ss. 4 and 12—Expiry of period of limitation for filing appeal during vacation of court—Filing of copy application on re-opening date—Time taken for obtaining copy—If can be added to the period.

Where the period of limitation for filing an appeal has expired during the vacation the only privilege which is granted to the appellant under S. 4 of the Limitation Act is that he may file his suit or appeal on the day upon which the Court re-opens and on that particular day alone. If he delays in making his application for a copy until that day, then he is applying for a copy when the period of limitation has already expired and the extension granted by the application of S. 4, cannot be combined with an extension under S. 12 of the Act.

Appeal against the order of the District Court of East Godavari at Rajahmundry, dated 30th August, 1939 and made in I.A. No. 327 of 1939 in unregistered appeal bearing D.R. No. 2555

1. 1914 M.W.N. 46.

* S.A. No. 37 of 1941. 16th March, 1942.

of 1939 preferred against the decree of the Court of the District Munsif of Rajahmundry in O.S. No. 249 of 1938.

Kamaraju Pantulu v. Balla Saramma.

D. Narasaraju for Appellants.

M. S. Ramachandra Rao for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal by two would-be appellants in the Court of the learned District Judge of East Godavari. They attempted on the 21st of July, 1939 to obtain a favourable order from the learned District Judge under S. 5 of the Limitation Act for excusing a delay of 19 days in presenting their appeal. The learned District Judge refused to excuse that delay and dismissed the petition and as a natural consequence of that order the appeal was rejected.

The argument put forward before me is that the application made by the appellants before the District Judge was really unnecessary, that there was no delay to be excused at all, and that when they first presented their appeal on the 7th of July it was in fact presented in time.

The facts and dates are as follows: The decree of the first Court against which the appellants desired to appeal was passed on the 2nd May, 1939. A few days later the Court rose for the summer vacation, and both it and the District Court re-assembled after the summer vacation on the 19th June. The period of limitation for appeal is thirty days, and thirty days of course expired before the 19th of June, but under the provisions of S. 4 of the Limitation Act, the appeal could undoubtedly have been presented on the 19th of June. On that date, however, the appellants did not present their appeal, but presented instead a copy application in the Court of first instance. They now maintain that inasmuch as they had a right of presenting the appeal on the 19th of June they had also a right of applying for a copy on that day, and then, availing themselves of the provisions of S. 12 of the Limitation Act, of adding to the period of limitation the time taken by them from the 19th of June to obtain the copy. In support of this position the appellants rely upon *Pandharinath* v. *Shankar*[1] and *Siyadat-un-nissa* v. *Muhammad Mahmud*[2] and also upon a case in *Saminatha Iyer* v. *Venkatasubba Iyer*.[3] It seems to me that *Saminatha Iyer* v. *Venkatasubba Iyer*[3] is distinguishable from this case on the facts for, in that case the judgment against which the appeal was sought to be filed was pronounced on the very last day the Court was sitting, so that it was physically impossible for any application for a copy to have been made on the same day. I have also been referred to other decisions in Madras by the learned counsel for the appellants, *Subramanyam* v. *Narasimham*[4] and *Ummathu* v. *Pathumma*.[5] In *Subramanyam* v. *Narasimham*,[4] there is a brief reference to the Allahabad and Bombay decisions but on the facts of that case it was unneces-

1. (1901) 25 Bom. 586.
2. (1897) 19 All. 342.
3. (1903) 13 M.L.J. 300: I.L.R. 27 Mad. 21.
4. (1920) 38 M.L.J. 465: I.L.R. 43 Mad. 640.
5. (1921) 41 M.L.J. 84: I.L.R. 44 Mad. 817.

Kamaraju Pantulu v. Balla Saramma.

sary to express any agreement with those decisions. In *Ummathu* v. *Pathumma*,[1] one of the learned Judges appears to approve of the Allahabad and Bombay decisions but the other learned Judge doubts whether they are correct. In *Masilamani* v. *Aruunga Mudali*,[2] which has been cited by the learned counsel for the respondent, another Bench of this Court refused to follow *Saminatha Iyer* v. *Venkatasubba Iyer*,[3] unless the facts of that case were in all respects reproduced. It seems to me that in these circumstances there is no direct authority in Madras which is binding upon me and with respect I am in agreement with Ramesam, J., in *Ummathu* v. *Pathumma*;[1] in holding that the Allahabad and Bombay decisions referred to by the learned counsel for the appellants in support of this appeal are wrong.

In my opinion the real clue to the decision of this appeal is contained in a judgment of the Privy Council reported in *Maqbul Ahmad* v. *Pratap Narain Singh*.[4] That judgment contains an analysis of S. 4 of the Limitation Act and shows that S. 4 by its very language cannot extend the period prescribed for the presentation of any suit or appeal or application. Its purpose is merely to allow any suitor or applicant to file his suit or application on a date after the expiry of the prescribed period if that period had expired while the Court was not sitting. It was therefore held in *Maqbul Ahmad* v. *Pratap Narain Singh*,[4] that there was no possibility of adding to the period of extension granted by S. 4 a further period which was said to fall within S. 14. In my opinion although in the decision in *Maqbul Ahmad* v. *Pratap Narain Singh*[4] the Court was concerned only with the question of combining the periods under S. 4 and S. 14, the principles of that decision will apply equally to any such attempt at combination. I have already had a somewhat similar case to deal with in a judgment which is reported in *Chidambaram Chettiar* v. *Venkatasubba Naik*.[5] The question there was whether an acknowledgment under S. 19 made a day on which the Court re-opened and therefore on the day on which a suit could have been filed under S. 4 was an acknowledgment which would avail to extend the period of limitation. I held in that case that it could not have that force. S. 4 presupposes by its very language that the prescribed period had already expired, and under S. 19 it was necessary that the acknowledgment should be made within the prescribed period. It seems to me that the same principles will apply to S. 12 as they do to Ss. 14 and 19. S. 12 says that "in computing the period of limitation prescribed" for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded and also the time requisite for obtaining a copy of the decree. S. 12 therefore assumes that the time requisite for obtaining the copy of decree must begin before the prescribed period is over. It has already been held

1. (1921) 41 M.L.J. 84: I.L.R. 44 Mad. 817.
2. (1920) 12 L.W. 460.
3. (1903) 13 M.L.J. 300: I.L.R. 27 Mad. 21.
4. (1935) 68 M.L.J. 665: L.R. 62 I.A. 80: I.L.R. 57 All. 242 (P.C.).
5. (1937) 1 M.L.J. 262.

Kamaraju Pantulu v. Balla Saramma.

that under S. 4 the right to present a suit or appeal or application on the day upon which a Court re-opens is a special right which cannot extend the period of limitation prescribed in the Act. The section pre-supposes that that period has already expired. It seems to me therefore that under S. 4 the only privilege which is granted to the suitor or appellant is that he may file his suit or appeal on that particular day and that particular day alone. If he delays in making his application for a copy until that day, then he is applying for a copy when the period of limitation has already expired and following the principles laid down in *Maqbul Ahmad* v. *Pratap Narain Singh*,[1] I must hold that the extension which is granted to him by the application of S. 4 cannot be combined with the extension which he seeks under S. 12. It is clear, therefore, to my mind that the appeal in question was time barred when it was presented on the 7th of July and the view of the appellants themselves that it was necessary for them to apply under S. 5 of the Limitation Act was the correct one.

The question then arises whether the learned Judge was right in refusing to excuse the delay. On this point it is contended for the respondent that no second appeal lies in this case and it seems to me that, strictly speaking, that is so, inasmuch as there has been no first appeal in existence; and this appeal is not really an appeal against an order of the District Judge dismissing the appeal but an appeal against an order refusing to excuse the delay, against which no second appeal is provided. I have, however, heard the legal arguments involved in this case because they appeared to me to be important, and there is no reason why I should not treat this second appeal as if it were a revision petition. Having made that decision I am now unable to interfere with the learned District Judge's order. It is a matter for his discretion to decide whether he should excuse the period of delay or not, and when he has decided that no sufficient grounds existed for excusing the delay I do not think it is within my powers of revision under S. 115, Civil Procedure Code to interfere with that decision.

In the result the appeal must fail and is dismissed with costs.

K.S. ——— *Appeal dismissed.*

PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD ATKIN, LORD THANKERTON, LORD ROMER AND SIR GEORGE RANKIN.

Kedar Nath Goenka .. *Appellant**

v.

Maharaj Kumar Babu Bageswari Prasad Singh and others .. *Respondents.*

P.C. Kedar Nath Goenka v. Bageswari Prasad Singh

Civil Procedure Code (V of 1908), S. 144—Applicability—Smaller sum than that ultimately found due paid into Court pending appeal and drawn out by decree-holder—Re-payment by way of restitution on appellate decree fixing larger amount—If can be claimed.

1. (1935) 68 M.L.J. 665: L.R. 62 I.A. 80: 57 All. 242 (P.C.).
* P.C.A. No. 52 of 1940. 18th November, 1941.

P.C.

Kedar Nath Goenka *v.* Bageswari Prasad Singh.

A sum of Rs. 61,000 brought into Court by the appellant (the judgment-debtor) pending his appeal as being enough to meet the decree was taken out by the respondent. The amount due to the respondent turned out according to the order of the High Court as approved by the Privy Council to be a sum in excess of Rs. 61,000, namely Rs. 75,000. When execution was eventually sought of the decree, the appellant got in first with an application for restitution claiming payment back of the Rs. 61,000 which the respondent had taken out.

Held, that the appellant having only paid in a sum which was less than the sum which turned out to be due to the respondent, could not claim that he could have restitution of that money and S. 144 of the Civil Procedure Code has no application at all.

Appeals from decrees of the High Court at Patna reversing decisions of the Subordinate Judge.

C. S. Rewcastle, K.C. and *S. P. Khambatta* for Appellant.

J. M. Parikh for Respondents.

Their Lordships' Judgment was delivered by

Lord Atkin.

LORD ATKIN.—Their Lordships do not find it necessary to hear counsel for the respondents in this case. These are appeals from decrees of the High Court at Patna, which reversed decisions of the Subordinate Judge on two matters which arose under these circumstances: In 1901, a certain property in Bihar was sold by the Collector for arrears of land revenue. It belonged to the respondents or their predecessors. There being an irregularity in the sale, the present appellant, whose father had been the purchaser, by a decree which was given in a suit against him for possession was compelled to surrender the property. In that suit possession was decreed and mesne profits were assessed by the Subordinate Judge. He assessed the mesne profits at a particular rate and he gave interest at 12 per cent. throughout. There was an appeal from that decision and the High Court increased the amount of the mesne profits, but they decreed that interest should be at 12 per cent. up to the date at which possession of the property was given to the present respondents and that after that the interest should be six per cent. There was an appeal from that decision to the Privy Council and the Privy Council in *Babu Kedarnath Goenka* v. *Babu Bageswari Prasad Singh*[1] varied the decree only by saying that interest should be at 6 per cent. throughout. Subject to that, their Lordships affirmed the decision of the High Court. The result of those proceedings was that the figure arrived at on the footing of interest as given by the High Court was a sum of 89,000 rupees, whereas the figure which was the right figure as approved by the Privy Council was some 75,000 rupees.

In the meantime, while the decree of the Subordinate Judge stood and while the interest stood at the rate of 12 per cent., the present appellant had brought into Court the sum of Rs. 61,000 as being enough to meet the position. Soon after payment in, that sum was taken out by the present respondents. The amount due to the respondents turned out, according to the order of the High Court as approved by the Privy Council, to be a sum which was in excess of Rs. 61,000 namely, Rs. 75,000 and the result was that when the appellant had paid in Rs. 61,000 he paid in less than

1. (1937) 2 M.L.J. 202: L.R. 64 I.A. 240: I.L.R. 16 P. 382 (P.C.).

P.C.

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the sum that was eventually found to be due to the present respondents. Other matters arose and thereupon execution was eventually sought of the decree against the present appellant, but the appellant got in first with an application for restitution. The first of these appeals arises on his petition for restitution namely, payment back to him of the Rs. 61,000 which he had paid into Court and which the respondents had taken out. That depends upon the provisions of S. 144, Civil Procedure Code. That section provides:

"Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed."

It appears to their Lordships impossible to suggest that the appellant, who, after all, only paid in a sum which was less than the sum which turned out to be due to the respondents, could claim that he could have restitution of that money, he at the same time making in that petition, be it observed, no suggestion that he would pay the actual amount of the decree in respect of which he paid in the money. That, however, is not so material. There was a larger sum due from him than the sum which he paid in, and therefore in the opinion of their Lordships, following the opinion of the High Court, the section has no application at all. Indeed, the Subordinate Judge would appear to have been of that opinion, but he misled himself somehow or other into the mistaken belief that the respondents before the High Court, when the matter of the amount of the decree was adjusted by that Court, had withheld from the High Court the fact that this amount of money had been paid into Court and been taken out. It is first of all, only necessary to say that there was no such suppression of the fact, which was brought home to the High Court who knew all about it, and, secondly, that had it been suppressed, it was quite irrelevant to the matter that the High Court had to deal with, which was what was the proper decree to make after the judgment given by the Privy Council and what was the form of the decree which ought to have been made by the Subordinate Judge at the time that he made it. No question arises at all, in the opinion of their Lordships, in reference to this question of restitution. The appellant had no right to restitution, and his petition praying for it was properly dismissed.

The other appeal depended upon the question of the figures in the execution decree. That, again, has been quite rightly adjusted. The real complaint made by the appellant on the restitution appeal is that, unless some credit is given somewhere for this 61,000 rupees, injustice would be done. That is perfectly true: injustice would have been done on the execution decree if that amount had not been taken into account. It has been taken into account and quite correct figures have been arrived at. Therefore, the appeal in respect of that matter must be dismissed. There appears to their Lordships to be no ground whatever for suggesting that anything wrong is to be found in either of the orders made by the High Court in respect of the matters under appeal

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and in these circumstances their Lordships will humbly advise His Majesty that these appeals be dismissed and that the appellant pay the costs.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *T. L. Wilson & Co.*

K.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Bhamidipati Kameswara Rao .. *Appellant** (*Plff.*)

v.

The National Movietone Company, Ltd., Kilpauk, Madras and another .. *Respondents.* (*Defts.*).

Kameswara Rao v. The National Movietone Company, Ltd., Kilpauk, Madras.

Jurisdiction—Contract of hire—Film—Hiring out to cinema proprietor for exhibition—Place of contract—Completion of contract depending on the film reaching the hands of proprietor of cinema.

In a suit for damages for infringement of copyright of a literary production—a drama, which had been converted into a cinema play by the defendants. the complaint was that the defendants had entered into a contract with the proprietor of a cinema at *R* to exhibit the film there, and that in pursuance of such contract the film had been also exhibited. On the question of jurisdiction whether the suit will lie at *R*,

Held, that since the transaction of hiring cannot be completed until the article hired is in the hands of the person to whom it is to be hired, the action of hiring out the film, in this case, was not complete until the film had reached *R* and was delivered to the proprietor of the cinema. Part of the cause of action arose in *R* and therefore the suit will be maintainable in the Court at *R*.

Appeal against the decree of the District Court of East Godavari at Rajahmundry, dated 18th September, 1939 and passed in O.S. No. 31 of 1938.

V. Govindarajachari for Appellant.

K. R. Rangaswami Aiyangar and *P. S. Sarangapani Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for damages for infringement of copyright. The plaintiff claims to have written the dramatic work which has been converted according to him, by the defendants into a cinematograph film. He further complains that the defendants entered into a contract with the proprietor of a cinema in Rajahmundry to exhibit this film and that the film was duly exhibited in Rajahmundry in pursuance of that contract. A number of issues have been framed, and an important issue of jurisdiction was based upon a contention on the part of the defendants who are a Movietone Company of Madras, and a private individual who is said to have directed the production of the film in Madras on behalf of the 1st defendant and who lives in Madras, that the suit did not lie in Rajahmundry but lay only in Madras. The learned District Judge, after an elaborate judgment, has held that the suit did not lie in Rajahmundry and he has returned the

*C.M.A. No. 312 of 1940. 12th March, 1942.

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plaint to the plaintiff for presentation in the proper Court. The plaintiff has appealed against this order.

It seems to me that although the learned District Judge has gone at a great length into a number of factors in this case the issue is really a very simple one. On the question whether the action of the cinema proprietor in Rajahmundry is the action of an agent of the first defendant, I am in entire agreement with the learned District Judge that there is no such relationship between the two parties. The first defendant obviously hired the film in question to the proprietor of the cinema, and the mere fact that the arrangement between them was that profits should be paid to the Movietone company on a percentage basis instead of in a fixed sum makes no difference to the essential nature of the contract. It was clearly a case of the first defendant hiring the film. The plaintiff therefore cannot say that he has any direct cause of action against the first defendant from the fact that the proprietor of the cinema, whom he has not chosen to implead as a defendant, actually exhibited the film. But S. 2 (2) (*a*) shows that any one who lets for hire any work, which to his knowledge infringes copyright, is deemed to have infringed the copyright himself. It is undeniable that the first defendant in this case has let this particular film for hire to the proprietor of the cinema. The simple question therefore which arises for decision is whether this action of letting the film for hire is one which was completed in Madras or was completed in Rajahmundry. If it was completed in Madras, then there is no part of the cause of action which arose in Rajahmundry. If it was completed in Rajahmundry, then obviously this part of the cause of action did arise in Rajahmundry and under S. 20 (*c*) of the Code of Civil Procedure, the District Judge at Rajahmundry has jurisdiction. It seems to me that in the absence of any specific terms in the actual contract between the parties to the contrary, it is reasonable and natural to assume that a transaction of hiring cannot be completed until the article hired is in the hands of the person to whom it is to be hired.

A great deal of discussion appears to have centred in the Court below round the question as to where the contract was completed. It seems to me that this question is entirely irrelevant. There may be ground for holding that the contract was completed in either Madras or Rajahmundry but the mere completion of the contract is no part of the cause of action; for it is only if the contract is carried out by the first defendant that the plaintiff can have any possible grievance. I therefore return to the question of whether the hiring took place in Madras or in Rajahmundry. On this question the contract is silent. The only reference to the transport of the film from Madras to Rajahmundry is in clause (5) which says that the 'to and fro charges together with the incidental charges' are to be borne by the proprietor of the cinema. Nothing is said as to who shall shoulder the risk if anything happens to the film in the course of its journey between Madras and Rajahmundry. It seems to me obvious that if the film does not reach Rajahmundry, the whole contract must come to an end because the main terms of the contract are that the film was to be shown in a particular cinema and the profits of the showing of

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the film were to be divided in a particular proportion between the parties to the contract. If, therefore, the film never reaches Rajahmundry the main terms of the contract will be incapable of fulfilment.

For this reason and on the general ground that an article cannot be said to be hired until it reaches the hands of the person to whom it is to be hired, I would hold that the action of hiring out this film was not complete until the film had reached Rajahmundry and was delivered to the proprietor of the cinema. Part of the cause of action, therefore, arose in Rajahmundry and this suit will lie in the Court of the District Judge. A separate argument has been addressed to me on behalf of the second defendant who says that the action of hiring out the picture to the proprietor of the cinema in Rajahmundry was one with which he had nothing to do and that therefore that part of the cause of action has no reference to him. It is not however open to me at this stage and in the hearing of this appeal to say that the plaintiff has no cause of action against the second defendant. That is a matter which will be decided by the learned District Judge himself when he proceeds to dispose of the suit according to law. I must, for the reasons given, set aside the order of the learned District Judge and remand the suit to him for disposal according to law. The costs of this appeal must be paid by the respondents.

K.C. ——— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Pariti Narayana Murti .. *Appellant** (*Accused —Prisoner*).

Narayana Murti, *In re.*

Evidence Act (*I of* 1872), *S.* 24—*Confessional statement—Statement on oath before Deputy Registrar of Co-operative Societies—Whether one made under threat.*

S. 24 of the Evidence Act says nothing about voluntary statements. A statement made on oath may be said in certain cases to be made as the result of the holding out of a threat; but that is always a question of fact.

Held, that a confessional statement made by the accused on oath before the Deputy Registrar of Co-operative Societies was under the circumstances of the case admissible in evidence against him.

Emperor v. *Dawood Kazi*, (1925) I.L.R. 50 Bom. 56; *Queen* v. *Gopal Doss*, (1881) I.L.R. 3 Mad. 271 (F.B.) and *Peddabba Reddi* v. *Varada Reddi*, (1928) 56 M.L.J. 570: I.L.R. 52 Mad. 432, *referred to.*

Appeal against the order of the Court of Session of the Vizagapatam Division in C.C. No. 28 of 1941.

B. V. Subramaniam for Appellant.

A. S. Sivakaminathan for Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The appellant was convicted by the Sessions Judge of Vizagapatam of offences punishable under Ss. 467, 471, 409 and 477-A of the Indian Penal Code and sentenced to two years

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* Crl. App. No. 645 of 1941. 11th March, 1942.

Narayana Murti, *In re.*

rigorous imprisonment under each count, the sentences to run concurrently.

The chief question in this appeal—as in the trial—is whether a confessional statement made by the accused on oath before the Assistant Registrar is admissible evidence against him. It is argued on a point of law that no statement made on oath can be a voluntary statement that would be admissible under S. 24 of the Evidence Act. The learned advocate for the appellant relies on *Emperor* v. *Dawood Kazhi*,[1] the decision of a single Judge. The question there was whether a statement made on oath by an accused person examined by a coroner was admissible against him in the Sessions trial. The learned Judge held that it was not. His judgment is concerned primarily with the questions whether the statement of the accused was protected by virtue of S. 132 of the Evidence Act and whether the coroner did not act in contravention of S. 162 of the Civil Procedure Code in recording a statement on oath from the accused—or, rather, having recorded a statement on oath in ignorance of the fact that the person giving the statement would be an accused, he acted illegally in putting that statement before the coroner's jury. He decided both these questions in favour of the accused; and then, in the last sentence or two of his judgment he says:

> "The statement before the coroner in this case cannot be admitted as a confession as it is a statement on oath. A confession must be voluntary; and a person who is summoned to give evidence and who is put on oath, and who answers questions or makes a statement under the compulsion of his oath cannot be said to have made a voluntary statement."

It may be said that this learned Judge, during the course of his judgment, expressed his disagreement with the decisions of two Full Benches of his own Court. S. 24 of the Evidence Act says nothing about voluntary statements. It makes irrelevant a confession if it appears to the Court that that confession was "caused by any inducement, threat, or promise .... proceeding from a person in authority .... sufficient .... to give the accused person grounds which would appear to him reasonable for supposing that by making it he would .... avoid any evil of a temporal nature ...." So that the statement with which we are concerned can only be inadmissible on the ground that it was caused by a threat. It does not seem to me reasonable to argue that the administering of an oath is tantamount to a threat to the person under oath that if he does not speak the truth, he will be punished for it. If that were the case, there would be no reason for the enactment of the proviso of S. 132 of the Evidence Act; for if no evidence on oath by a witness could amount to a voluntary confession, it never could be used against him. On at least two occasions a somewhat similar question has been considered by this Court. A Full Bench of five Judges held in *The Queen* v. *Gopaldas*,[2] that a statement given on oath in an affidavit filed in a civil suit would be used against a person making the statement. That case was followed in *Peddabba Reddi* v. *Varada Reddi*,[3] in which a statement

1. (1925) I.L.R. 50 Bom. 56.
2. (1881) 3 Mad. 271 (F.B.).
3. (1928) 56 M.L.J. 570: I.L.R. 52 Mad. 432.

Narayana Murti, *In re.*

given by a person examined as a witness was subsequently used against him on a charge of defamation.

A statement made on oath may be said in certain cases to be made as the result of the holding out of a threat; but that is always a question of fact. It is contended that in this case there was such an inducement; and the learned counsel for the appellant relies on a statement made by P.W. 7 a retired District Medical Officer and the Chairman of the Co-operative Bank, six of whose cheques the accused is said to have forged. It appears from the cross-examination that he replied in the affirmative to this question put by the counsel for the accused: "As soon as P.W. 3 and yourself went to the bank on 23rd April, 1941, did you not ask the accused whether he realized the consequences of the fraud that he had committed?" Such a question was not however put to P.W. 3, the Deputy Registrar of Co-operative Societies who conducted the inquiries and questioned the accused. Both P.W. 3 and P.W. 7, say in examination in chief that when they entered the premises of the bank, P.W. 3 first checked the cash balance with reference to the cash book and found it to be correct. P.W. 3 then asked the accused about the forged cheques and showed those cheques to him; whereupon the accused admitted that he had forged those cheques and drawn money on them. It seems to me that if it is true that such a question was put to the accused, it must have been put to him after he had been shown these cheques and the accused had answered that he had forged them. It seems most unlikely that P.Ws. 3 and 7 walked straight into the bank and without asking the accused any preliminary questions, said to him, "Do you realize the consequences of the fraud you have committed?"

Apart from the written statement given on oath, an earlier statement was made by the accused, as just mentioned, in answer to an informal question of P.W. 3 as to what he had to say with regard to the forged cheques which P.W. 3 showed to him. I do not believe that the statement made by the accused in response to that question was brought about by any implied threat that he would be punished if he did not speak the truth.

Even apart from the confessional statements, I consider there is sufficient evidence to bring home this case to the accused. He was in entire charge of the books of the bank, which was a very small one, the only other person in the office being an attender who did menial duties; so that all the cheques passed through the hands of the accused and he made all the relevant entries in connection with these cheques in the accounts. The forged cheques bore numbers that made it clear that the cheques did not come from the cheque book that was standing in the name of the person whose signature the cheques bore; and so if some other person had forged these cheques, as the accused suggests, the accused would have seen when he came to enter the particulars of the cheque in the ledger page of the person on whose account the cheques were being drawn, that the cheque bore a number which was not in the book standing in the name of that person. That would have led him to examine the signature on the cheque more closely; and if he had done

so and compared the signature with the standard signature in the bank's books, there could have been no doubt that the signatures on the cheques were forgeries. Moreover that forged signatures were not passed as genuine by mere negligence is indicated by the fact that the accused entered at the top of the ledger page the numbers of the cheque book containing the forged cheques, obviously for the purpose of concealing the fact that the forged cheques were drawn from a cheque book that had not been issued to the person whose signature had been forged. P.Ws. 3 and 7 have proved that the cheque book which was used for making the forged cheques was kept by the accused in a locked drawer, which cheque book he produced upon being questioned. Finally, when P.W. 2 questioned the accused about the fraud on 24th March, 1941, which was sometime before the incident spoken to by P.Ws. 3 and 7, the accused did not give any reply or put forward any defence to the accusation that he had been guilty of forging cheques and misappropriating the amounts that he had realized on them.

I have no doubt that the accused was properly convicted. The sentence of two years rigorous imprisonment is a light punishment for such serious offences.

The appeal is dismissed.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

P. K. Subramania Ayyar .. *Appellant** (*Respt.*)

v.

K. T. S. Thandavamurthi Chetty .. *Respondent* (*Applicant*).

Receiver—Official trustee appointed receiver pending his suit for recovery of property of plaintiff's estate vested in him—Decree for charge over property of defendant vested in receiver in favour of stranger in a suit without impleading receiver—Validity of the charge in the circumstances.

S died leaving a will, dated the 15th October, 1931, by which he bequeathed to his elder son *N* a house *X* and to his younger son *T* a house *Y*. *T* was then a boy of about 10 years of age and his estate vested on the 28th October, 1936 in the Official Trustee of Madras who as guardian of his property obtained probate of *S's* will. *N* had taken possession of both properties and the Official Trustee was compelled to file a suit on the Original Side of the High Court to recover possession of the minor's interest in his father's estate. The Official Trustee based his case on two grounds namely, (1) that *T* was entitled to the property by reason of the will and (2) even if the will were invalid *T* was entitled to have the properties partitioned and his share delivered to him. The Court appointed the Official Trustee the receiver in the suit. *N* had created a mortgage of property *X* and by an order of Court this property was sold and the mortgage discharged out of the proceeds. There remained a balance of Rs. 1927-5-3 which was paid into the Court to the credit of the suit. Then one *A* instituted a suit in the City Civil Court against *N* for a decree for specific performance of an agreement to execute in his favour a mortgage of property averring that he had advanced moneys to *N* in anticipation of the mortgage. In the alternative he asked for a charge on the property to the extent of *N's* indebtedness to him. On the 8th August, 1938, *A* applied for an attachment before judgment of the Rs. 1927-5-3, lying to the credit of the Official

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*O.S.A. No. 6 of 1942. 20th March, 1942.

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Trustee's suit in the High Court but without obtaining the permission of the High Court. The attachment remained effective until the 27th July, 1939. On the 9th July, 1939 *A* was granted a decree in his suit and as property *X* had been sold by the time and it was not possible to give a decree for specific performance of the mortgage the Court gave a money decree for Rs. 760, with interest and costs and a charge on the money lying in Court to the extent of the decretal amount. On the 18th August, 1938, the Official Trustee as receiver applied for the payment out to him of the money in Court. The balance of the amount deducting the amount of the attachment by *A* was paid to the Official Trustee leaving it to the Official Trustee whether he should contest the attachment. The Official Trustee took no steps to challenge the attachment until *A* applied to the High Court for an order allowing him to withdraw sufficient of the money in Court to satisfy his decree. The Official Trustee objected and it was held that the attachment was invalid as at the time it was made, it had not been decided to whom the balance of the sale proceeds belonging. On the 26th January, 1940 the Official Trustee's suit was decreed finding the will to be valid and that *T* was entitled to *Y* property with mesne profits from the date on which *N* took possession. The mesne profits were found to be Rs. 3,150 and on 4th March, 1941 the Official Trustee applied for an order attaching the balance of the sale proceeds of *X* property lying to the credit of the suit. Relying on the charge which the City Civil Court had given him *A* resisted the application of the Official Trustee. In the circumstances,

Held, whether or not the Official Trustee as the receiver in his suit should have been made a party, the decree in *A's* favour granting a charge over property belonging to *N* having been passed by a Court of competent jurisdiction is valid and the Official Trustee as representing *T* is not entitled to any priority. The appointment of a receiver did not give *T* any charge.

On appeal from the Judgment and Order of the Hon'ble Mr. Justice Krishnaswami Aiyangar, dated the 5th December, 1941 and passed in exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2941 of 1941 in C.S. No. 79 of 1937.

K. Rajah Aiyar and *M. Ramachandran* for Appellant.

R. Thirumalai Thathachariar for Respondent.

The Judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The question here is whether a decree passed by the City Civil Court declaring that the appellant is entitled to a charge over the proceeds of the sale of property belonging to one Natesa is effective as against the respondent, who is Natesa's brother. In 1931 Sabapathi Chetti, the father of Natesa and the respondent, died leaving a will dated the 15th October, 1931, by which he bequeathed to Natesa a house known as 2|46, Erulappan Street, Madras and to the respondent a house known as 17, Kumarappa Mudali Street. The respondent was then a boy of about ten years of age. On the 28th October, 1936 the estate of the minor was vested in the Official Trustee of Madras and as the guardian of the respondent's property he obtained probate of the father's will. Natesa had taken possession of both the properties and the Official Trustee was compelled to file a suit (No. 79 of 1937) on the Original Side of this Court to recover possession of the minor's interest in his father's estate. The Official Trustee based his case on two grounds. In the first place he contended that the respondent was entitled to the property representing No. 17, Kumarappa Mudali Street, by reason of the will. In the second place he said that even if the will were invalid, the respondent was entitled to have the proper-

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ties partitioned and his share delivered to him. The Court appointed the Official Trustee the receiver in the suit. It transpired that after his father's death, Natesa had created a mortgage on the property left to him. By an order of the Court this property was sold and the mortgage discharged out of the proceeds. There remained a balance of Rs. 1,927-5-3, which was paid into Court to the credit of the suit.

On the 17th February, 1938, the appellant instituted O.S. No. 244 of 1938, in the City Civil Court against Natesa for a decree for specific performance of an agreement to execute in his favour a mortgage of the Erulappan Street property. He averred that he had advanced moneys to Natesa in anticipation of the mortgage. In the alternative he asked for a charge on the property to the amount of Natesa's indebtedness to him. On the 8th August, 1938, the appellant applied for an attachment before judgment of the Rs. 1,927-5-3, lying to the credit of the Official Trustee's suit in this Court. The appellant had not received permission of this Court to apply for the attachment of these moneys, and as for the time being they were vested in the Official Trustee in his capacity of receiver in C. S. No. 79 of 1937, the appellant's action amounted to contempt of Court, but his action was not resented and the attachment remained effective until the 27th of July, 1939.

On the 9th January, 1939, the appellant was granted a decree in his suit against Natesa. The Erulappan Street property had by this time been sold and therefore it was not possible for the Court to give a decree for specific performance of the mortgage, but it gave a money decree for Rs. 760, with interest and costs, and a charge on the property to the extent of the decretal amount. The property having been converted into money and part of the money spent in discharging the mortgage over the property, the charge could only be effected, if at all, on the money lying to the credit of the Official Trustee's suit in this Court. In the meantime, namely on the 18th August, 1938, the Official Trustee as receiver applied for the payment out to him of the money in Court. On this application Venkataramana Rao, J., passed this order:

"The balance of the amount, deducting the amount of the attachment may be paid to the Official Trustee. I leave it to the Official Trustee whether he should contest the attachment."

The attachment referred to in this order was, of course, the attachment obtained by the appellant in the City Civil Court and it meant that the attachment was to remain effective to the extent of the appellant's claim against Natesa, unless the Official Trustee took steps to challenge it. The Official Trustee took no steps to challenge the attachment until the appellant applied to this Court for an order allowing him to withdraw sufficient of the money in Court to satisfy his decree against Natesa. When this application was made, the Official Trustee objected, and as a result of his objection the Master held that the attachment was invalid, because at the time it was made it had not been decided to whom the balance of the sale proceeds of the Erulappan Street property belonged.

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On the 26th January, 1940, Somayya, J., gave judgment in the Official Trustee's suit. The learned Judge found the will to be valid and consequently held that the respondent was entitled to the Kumarappa Mudali Street property with mesne profits from the date on which Natesa took possession. As the result of investigation it was found that the respondent was entitled to a sum of Rs. 3,150 by way of mesne profits. On the 4th March, 1941, the Official Trustee, as the decree-holder in C.S. No. 79 of 1937, applied for an order attaching the balance of the sale proceeds of the Erulappan Street property lying to the credit of the suit. It was then the appellant's turn to object. Relying on the charge which the City Civil Court had given him, he resisted the application of the Official Trustee and the Master held that his objection was well-founded. The respondent appealed and Krishnaswami Ayyangar, J., reversed the decision of the Master. The learned Judge considered that the decree of the City Civil Court was invalid as against the receiver in C.S. No. 79 of 1937, and on this ground he reversed the Master's order. This appeal is from the order of the learned Judge.

Mr. Rajah Aiyar on behalf of the appellant admits that his client was guilty of contempt in applying for the attachment of the moneys which the Official Trustee as receiver was entitled to hold in C.S. No. 79 of 1937, but he pertinently points out that no complaint was ever made on this ground and that his client's action in applying for attachment does not affect his present case. He contends that his client was entitled, as against Natesa, to ask for a charge on Natesa's property or the moneys realized by the sale without impleading the receiver, but even if he ought to have made the receiver a party, the fact that he did not do so does not mean that the decree passed of the City Civil Court can be regarded as a nullity. The receiver knew of the suit, but he did not seek to be made a party and at no time did he offer any objection to the reliefs which the appellant was seeking. When the Official Trustee himself applied for the attachment of the moneys in Court after he had obtained a decree in his suit, he did so not as receiver, but as the Official Trustee.

In *Kumar Suttya Ghosal* v. *Rani Golap Moni Debi*,[1] the Calcutta High Court held that a receiver is not a necessary party to a suit for possession of immovable property where the facts were these. The petitioners claimed to be the absolute owners and had been in possession as *howladars* of certain land in the district of Khulna. A receiver had been appointed to take charge of these lands but persons claiming adversely to the petitioners were in actual possession. The petitioners desired to bring a suit against those persons for possession and sought to join the receiver as a party. The Court held that the receiver was not a necessary party. In *Administrator-General* v. *Dasai Goundan*,[2] Wallis, J., followed this decision and referred to the case of *Smith* v. *The Earl of Effingham*.[3] In the last mentioned case a receiver had been appointed in a suit in which the priority of different encumbrances

1. (1897) 5 C.W.N. 27. 2. (1910) 9 M.L.T. 300.
3. (1844) 49 E.R. 1103: 7 Beavan 357.

Subramania Ayyar v. Thandavamurthi Chetty.

on an estate was to be determined. A person who claimed to be the first incumbrancer had not been made a party to that suit and he filed a bill of his own to establish his right. It was held that the receiver was not a necessary party to his suit.

The learned advocate for the respondent relies on the decisions in *Mrs. Levina Ashton* v. *Madhabmoni Desi*,[1] *Fraser & Ross* v. *Krishnaswami Ayyar*,[2] and *Kalyanasundaram Ayyar* v. *Narasimha Ayyangar*.[3] In the first of these cases the Calcutta High Court held that the sale of a foreclosure decree without the leave of the Court while the estate was in the possession of a receiver was illegal and liable to be avoided. That case is no authority for the proposition that the decree of the City Civil Court passed in favour of the appellant is a nullity. Whether it could be set aside at the instance of the Official Trustee as such or as the receiver is, of course, another matter. In *Jotindranath Chowdhury* v. *Sarfaraj Mia*,[4] the Calcutta High Court held that where property in the hands of a receiver is intended to be affected by the result of the suit the receiver is a necessary party to the suit. Again we do not regard this as an authority for relieving the Official Trustee of the necessity of getting rid of the decree obtained by the appellant, if he wishes to secure for the benefit of the younger brother the moneys which are in Court. In *Fraser and Ross* v. *Krishnaswami Ayyar*,[2] the question was whether the Court should have made the receiver a party to certain execution proceedings and *Kalyanasundaram Ayyar* v. *Narasimha Ayyangar*,[3] had reference to an assignment taken in good faith. In our opinion these cases also have no bearing on the question under discussion.

It is not necessary for the Court to decide whether the Official Trustee as the receiver in his suit should have been made a party to the appellant's suit or what steps are open to him to take. As far as this appeal is concerned the governing factor is that the appellant was granted a charge in a decree passed by a Court of competent jurisdiction and that decree stands. In these circumstances, can it be said that the Official Trustee as representing the respondent is entitled to priority? We think not. The appointment of the Official Trustee as receiver did not give the respondent a charge. The receiver was an officer of the Court appointed to hold the property in suit for the benefit of the person who could show a title to it. The respondent had no title to the moneys in Court. They belonged to his elder brother, and when the Official Trustee was granted a decree the respondent had no greater rights than were conferred by the decree. The appellant was in a better position because a Court of competent jurisdiction had given him a charge over the moneys. In these circumstances we consider that the decision of the Master should not have been disturbed.

The appeal will be allowed with costs and the Official Trustee will be directed to redeposit the money into Court.

K.S. ——— *Appeal allowed.*

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1. (1910) 14 C.W.N. 560.
2. (1922) 43 M.L.J. 211: I.L.R. 47 Mad. 47.
3. (1922) 44 M.L.J. 427.
4. (1910) 14 C.W.N. 653.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

Kannambra Nayar Veettil Valia Ammukutti Neithiar's son Kunhunni Elaya Nayar Avergal (deceased) .. *Appellant** (*1st respondent*)

v.

P. N. Krishna Pattar and others .. *Respondents.* (*Applt. and Respts.* 2 *and* 3).

Kunhunni Elaya Nayar *v.* Krishna Pattar.

Indian Contract Act (*IX of* 1872), *S.* 178—*Sale of Goods Act* (*III of* 1930), *S.* 1 (4)—*Share certificates are 'goods'—Deposit as security for debt though without instrument of transfer creates a pledge.*

Even before the passing of the Sale of Goods Act, the term 'goods' in S. 178 of the Contract Act would seem to include shares in joint stock companies; anyway as the result of the passing of the Sale of Goods Act and the amendment of the Contract Act the word 'goods' in the latter Act should receive the same meaning which it has in the Sale of Goods Act. By including shares in the definition of 'goods', the Legislature must have associated shares with the share certificate which is marketable. Accordingly the delivery of a share certificate by one person to another to be held by the latter as security for a debt due to him creates a pledge which he can enforce. But unless at the time of deposit or later the pledgee has taken a deed of transfer which he can use in case of necessity, he must have recourse to the Court when he wishes to enforce his security.

Judgment of Venkataramana Rao, J., in *Krishna Pattar* v. *Kunhunni Elaya Nayar*, (1941) 1 M.L.J. Reversed.

Appeal under clause 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Venkataramana Rao, dated the 25th October, 1940 and passed in S.A. No. 526 of 1937 reported in (1941) 1 M.L.J. 178, preferred against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A.S. No. 13 of 1936 (O.S. No. 111 of 1935, D.M.C., Palghat).

K. Kuttikrishna Menon for Appellant.

C. S. Swaminathan for Respondents.

The Court delivered the following

JUDGMENT.—The question raised in this appeal is whether there can be a valid pledge of shares by the deposit of the share certificate when it is not accompanied by an instrument of transfer. The appellant instituted a suit in the Court of the District Munsif of Palghat to recover what was due on a promissory note executed by one Subramania Pattar in favour of one Ramakrishna Pattar, the instrument having been endorsed to the appellant. When the appellant demanded the amount due under the promissory note, the maker deposited with him as security for payment a share certificate in respect of shares held by him in the Parli Tile Works, Limited. The certificate was not accompanied by a deed transferring the shares to the appellant, but he claims that notwithstanding this there was a valid pledge of the shares. The suit was contested by the fourth defendant, who is the first respondent in this appeal. On a date subsequent to the deposit of the

*L.P.A. No. 5 of 1941. 2nd April, 1942.

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share certificate with the appellant the first respondent attached the shares by a prohibitory order issued under O. 21, r. 46 of the Code of Civil Procedure. He denied that a valid pledge of the shares was created in favour of the appellant and maintained that he himself had obtained title to the shares by reason of the attachment and subsequent sale.

The District Munsif held that a valid pledge had not been created, but on appeal the Subordinate Judge of South Malabar reversed the District Munsif's decision. In his opinion, a valid pledge had been created by the deposit of the share certificate. The first respondent appealed to this Court. The appeal was heard by Venkataramana Rao, J., who agreed with the District Munsif and accordingly allowed the appeal. This appeal is from the judgment of Venkataramana Rao, J., under clause 15 of the Letters Patent.

In the opinion of Venkataramana Rao, J., 'shares' are not 'goods' within the meaning of S. 172 of the Indian Contract Act and there can be no valid security unless the scrip is accompanied by an instrument of transfer. When a share certificate is handed over by way of security to another with a deed of transfer duly executed, the transaction constitutes more than a pledge, because there is a transfer of the holder's rights in the property, subject of course to the right of redemption. We shall return to the meaning of 'pledge' in a moment. The learned Judge recognised that according to the English law the mere deposit of a share certificate by way of security is treated as an equitable mortgage, but in his opinion that did not help the appellant, because the deposit had not been made in the City of Madras. He regarded an equitable mortgage of movable property as being on the same basis as an equitable mortgage of immovable property and therefore an equitable mortgage of movable property could not be effected outside the towns specified in the Transfer of Property Act. It is not necessary for the Court to discuss this question because Mr. Kuttikrishna Menon, on behalf of the appellant, has been content to confine his case to the plea of pledge.

Now let us see what is implied by the expression 'pledge'. In *Halliday* v. *Holgate*,[1] Willes, J., placed a pledge between a simple lien and a mortgage. He pointed out that in the case of a lien there is no transfer of interest, but in the case of a mortgage the property passes. In the case of a pledge a deposit of goods is made security for a debt and the right to the property vests in the pledgee so far as it is necessary to secure the debt. S. 148 of the Indian Contract Act defines bailment as the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. S. 172 defines a pledge as the bailment of goods as security for the payment of a debt or the performance of an obligation. S. 176 provides that, if the pawnor makes default in payment of the debt, or performance of the contract at the stipulated time, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as collateral

1. (1868) L.R. 3 Exch. Cases 299.

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security; or he may sell them, on giving the pawnor reasonable notice of the sale. Therefore under Indian law as under English law a pledge is created by the delivery of goods as security.

In England a share is regarded as a chose in action. See *Harrold* v. *Plenty.*[1] In India a share is not a chose in action. S. 137 of the Transfer of Property Act says that nothing in Chapter VIII (which deals with transfers of actionable claims) applies to stocks and shares, and S. 28 of the Indian Companies Act states that shares constitute movable property. S. 2 (7) of the Sale of Goods Act, 1930, expressly includes shares in the definition given there of 'goods'. Before the passing of the Sale of Goods Act, 1930, sales of goods were regulated by the sections comprised in Chapter VII of the Contract Act, but the Sale of Goods Act repealed the whole of the chapter. S. 72 (one of the repealed sections) defined 'goods' as meaning every kind of movable property; and as shares are movable property, they were goods within the meaning of that section.

When the Sale of Goods Act was placed on the statute book S. 178 of the Contract Act was amended. Before the amendment the section read as follows:

> "A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly:
>
> Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud."

As a result of the amendment the expressions "mercantile agent" and "documents of title" are given the meaning assigned to them in the Sale of Goods Act. S. 1 (4) of that Act says:

> "'Document of title to goods' includes a bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented."

The Court has not been asked to say that a share certificate comes within this definition, and we will assume that it does not.

In *Lalit* v. *Haridas,*[2] the Calcutta High Court held that share certificates are neither goods nor documents of title within the meaning of S. 178 of the Contract Act, but this decision was given before the enactment of the Sale of Goods Act and, therefore, before the amendment of the Contract Act. On the other hand, the Bombay High Court, long before 1930, held that the term 'goods' used in S. 178 of the Contract Act includes shares in joint stock companies and consequently recognised that there could be a valid pledge of shares. See *R. D. Sethna* v. *National Bank,*[3] *Fazal* v. *Mangaldas*[4] and *Jamshedji* v. *Maganlal.*[5] It seems to us

1. (1901) 2 Ch. 314.
2. (1916) 24 C.L.J. 335.
3. (1910) 12 Bom.L.R. 870.
4. (1921) 46 Bom. 489.
5. (1925) 27 Bom.L.R. 514.

that even before the passing of the Sale of Goods Act the Bombay opinion was preferable to the Calcutta opinion, but as the result of the passing of the Sale of Goods Act and the amendment of the Contract Act we consider that the Bombay opinion is not open to dispute. We can see no valid reason for giving the word 'goods' a different meaning in the Contract Act from the meaning which it has in the Sale of Goods Act.

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We now come to the question whether a pledge of shares can be created by the mere deposit of the share certificate. A share is not a tangible thing. It is a share in the share capital of the company and is so defined in S. 2 (16) of the Indian Companies Act. Consequently it is necessary for a company to issue to a shareholder a certificate showing the number of shares which he holds. As shares are goods and therefore pledgeable, they can only be pledged by the deposit of the share certificate. It appears to us that by including shares in the definition of goods in the Sale of Goods Act the Legislature must have associated shares with the share certificate which is marketable. Otherwise, it is difficult to see how shares can be goods and the subject of pledge, the essence of which is delivery. To say that there can only be a pledge of shares when the share certificate is accompanied by a deed of transfer is making the transaction something more than a pledge, as we have already pointed out. We think that when a person delivers a share certificate to another to be held by him as security, there is under the law of India a pledge which he can enforce, but unless the pledgee at the time of the deposit secures a deed of transfer which he can use in case of necessity or obtains one from his debtor at a later stage, he must have recourse to the Court when he wishes to enforce his security. There is nothing to prevent a pledgee suing on the debt and asking the Court to sell the goods for him. If the goods happen to be shares, the Court can confer a full title on the buyer by following the procedure laid down in O. 21, r. 80 of the Code of Civil Procedure.

For these reasons we hold that the decision of the Subordinate Judge was correct and consequently we allow the appeal with costs of the hearing before Venkataramana Rao, J., and in this Court.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Muthal Achi .. *Petitioner** (*Plaintiff*)

v.

Doraisami Pillai and another .. *Respondents* (*Defendants*).

Muthal Achi v. Doraisami Pillai.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (h)—Payee of promissory note assigning debt—Assignee a woman—Claim of exemption whether allowable.

Where a woman, having taken an assignment, became the owner of a debt and claimed the benefit of the exemption provided by Madras Act IV of 1938 for woman creditors,

Held, that she was entitled to claim the exemption and it was no answer to say that the original payee of the suit note was a male.

*C. R. P. No. 573 of 1940. 23rd March, 1942.

Muthal Achi v. Doraisami Pillai.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Devakottah, dated 10th October, 1939 and passed in S.C.S. No. 64 of 1939.

T. L. Venkatarama Aiyar for Petitioner.

K. Vinayakam and *T. R. Venkataraman* for Respondents.

JUDGMENT.—The view taken by the lower Court that the plaintiff though a woman was not entitled to claim the exemption under S. 4 (*h*) of Act IV of 1938 merely because her assignor a male was not entitled to such exemption is clearly unsupportable. Having taken the assignment the plaintiff became the owner of the debt and when she claims the benefit of the exemption provided by the Act for woman creditors, it is no answer to say that the original payee under the suit note was a male.

Whether the plaintiff has fulfilled the other conditions necessary for the application of the provision has not been enquired into in the view taken by the lower Court. The decree of the Court below is therefore set aside and the case is remanded for enquiry and disposal according to law. Costs of this Civil Revision Petition will abide and follow.

K.S. ——— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN AND MR. JUSTICE SOMAYYA.

L. K. Minakshi Aiyar (dead) and another .. *Appellants** (*1st defendant*)

v.

Janaki R. Achalier and others .. *Respondents* (*Plffs. and defts.* 2-5).

Minakshi Ayyar v. Achalier.

Transfer of Property Act (IV of 1882), S. 83—Mortgagee accepting tender of mortgage amount—Whether can claim further relief against mortgagor—Redemption action—Costs of mortgagee—Rule regarding.

After the mortgagee accepts the deposit under S. 83 of the Transfer of Property Act he is not entitled to claim any further relief as against the mortgagors or the person making the deposit. He is bound to accept the deposit in full settlement of his claims. If he is not prepared to do it, then he ought to decline to accept the amount deposited.

In a redemption action the Court is bound to give the mortgagee his costs of the suit unless the Court is of opinion that his conduct has been vexatious or unreasonable so as to disentitle him thereto. Nor can he, where his conduct was neither vexatious nor unreasonable, be asked to pay the costs of the person suing for redemption.

Fisher on the Law of Mortgage, VII Ed., page 752, referred to.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Madura, dated the 31st March, 1939 and made in O. S. No. 12 of 1939, etc.

O. V. Balaswamy for Appellant in 328 of 1939 and for Respondent in 372 of 1940.

D. Ramaswami Aiyangar for Appellant in 372 of 1940 and for Respondent in 328 of 1939.

* Appeals Nos. 328 of 1939 and 372 of 1940. 3rd March, 1942.

Minakshi Ayyar *v.* Achalier. Somayya, J.

V. S. Rangachari and *V. Minakshisundaram* for Respondents.

The Judgment of the Court was delivered by

Somayya, J.—There are two appeals, A.S. Nos. 328 of 1939 and 372 of 1940, both arising out of O.S. No. 12 of 1939 which was a suit for redemption of a mortgage executed by defendants 2 to 5 in favour of the first defendant under Ex. B, dated the 26th January, 1934. Defendants 2 to 5 executed a subsequent mortgage in favour of the plaintiffs under Ex. A, on the 27th August, 1937 and the plaintiffs filed the suit out of which the appeals arise for redeeming the prior mortgage in favour of the first defendant. Before filing the suit the plaintiffs deposited the amount which they considered to be due under the mortgage Ex. B in O.P. No. 45 of 1938. This was on the 29th October, 1938. They made the present first defendant the prior mortgagee alone a party and asked for the usual reliefs grantable under S. 83 of the Transfer of Property Act. To this a statement of objections was filed by the respondent and two reasons were given by him for not accepting the amount deposited in Court. One is that the mortgagors who executed Ex. B to him and Ex. A to the plaintiffs (who were the petitioners therein) were disputing the right of the plaintiffs-petitioners and therefore it would be unsafe for him to receive the amount and hand over possession in the absence of the mortgagors. Therefore he said that unless the mortgagors were made parties to that petition, it would not be safe for him to receive the amount and to hand over possession to the applicants. It appears that the mortgagors refused to register the mortgage in favour of the plaintiffs and resort was had to proceedings by way of compulsory registration. The document was compulsorily registered in February, 1938. The petition under S. 83 of the Transfer of Property Act was filed on the 29th October, 1938 and notice thereof was given to the mortgagee-respondent on the 18th November, 1938. The respondent gave another reason for not accepting the amount and that is that there were crops on the land which he had raised. He said "The property which is under mortgage has been cultivated by the respondent and in a short while crops would be harvested". It is now found by the Subordinate Judge that the crops were five months old at the time of the petition and that they were harvested in February of the next year. As the mortgagor was not made a party to the application the Court passed an Order Ex. C, dated the 29th November, 1938, closing the petition on the ground that the respondent was not willing for the reasons stated by him in his counter affidavit to receive the amount and to give up possession. The present suit was filed on the 12th January, 1939. The prior mortgagee is the first defendant and the mortgagors are defendants 2 to 5. The lower Court has decreed redemption and to that extent there is no objection by any party. The first defendant is the appellant in A.S. No. 328 of 1939 and he objects to the order made by the lower Court as regards costs and as regards mesne profits prior to the date of suit. As regards the costs, the appellant objects to his being made liable to pay the costs of the plaintiffs which is the direction made by the lower Court. Issue 2 was raised regarding the liability of

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the first defendant for costs of the suit and on that issue the lower Court states thus:

> "As regards costs, since the deposit under S. 83 was good and since first defendant refused to receive the money and be redeemed he is liable to pay the costs."

The rule as to costs in a redemption action is laid down in O. 34, r. 10 of the Code of Civil Procedure:

> "In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or *redemption*, the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage-money such costs of the suit and other costs..............."

So the Court is bound to give the mortgagee his costs of the suit unless the Court is of opinion that his conduct has been such as to disentitle him thereto. The law is stated in Fisher on the 'Law of Mortgage' (7th edition) at page 752 thus:

> "RULE AS TO COSTS OF SUIT.—The mortgagee is entitled as of right to the costs properly incurred by him in an action of foreclosure, or redemption, and this right extends to an equitable mortgagee, including a mortgagee by deposit whether with or without a memorandum of deposit. But he may forfeit these costs by misconduct, or may even have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably."

The appellant only asks that he should be relieved of the liability to pay costs of the plaintiffs in this action. In the lower Court he no doubt asked for costs of the suit to be paid to him. But in valuing the memorandum of appeal he has confined it to the costs which he was asked to pay the plaintiffs, and we are therefore not concerned with his right to get costs from the plaintiffs. Hence the only question is whether he has been rightly made to pay the costs of the plaintiffs. We have therefore to see whether his conduct has been vexatious or unreasonable. In this case having regard to the fact that the mortgagors did not submit to registering the document without resort to compulsory registration and to the fact that even after the petition was filed on the 29th October, 1938, by the present plaintiffs under S. 83 of the Transfer of Property Act, a notice was issued by the mortgagors under Ex. J, dated 14th November, 1938, disputing the right of the present plaintiffs, at any rate to get redemption of the prior mortgage unconditionally, we do not think that there was anything unreasonable in the conduct of the mortgagee in insisting upon the mortgagors being made parties to the petition before submitting to redemption. It is unnecessary to consider whether strictly the mortgagors are necessary parties to an application under S. 83 of the Act. What we are concerned with is whether the conduct of the mortgagee in the circumstances of this case is such as to be properly characterised as vexatious or unreasonable. Far from being vexatious or unreasonable, we think there was every justification for him to make the request which he did that the mortgagors should also be made parties before any further orders are passed on that application. Since the plaintiffs did not take any steps to implead the mortgagors, the Court had no option but to pass an order which it did, namely, closing the application. The word 'closed' is really not proper. The petition should have been

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formally dismissed. We are clearly of opinion that there is nothing vexatious or unreasonable in the conduct of the mortgagee in refusing to accept the amount in the absence of the mortgagors.

This is enough to dispose of the appeal filed by the first defendant in so far as it relates to costs. He ought not to have been made liable to pay the costs of the plaintiffs. The next question is whether the plaintiffs are entitled to any mesne profits prior to the date of suit. The lower Court has found that the mortgagee was entitled to the income from the property up to the date when he got notice of the application under S. 83. This comes to a few hundreds of rupees. The amount which the plaintiffs deposited under S. 83 did not admittedly include this amount. The deposit under S. 83 is therefore open to this objection as well, that the amount which was deposited is not the full amount due under the mortgage. It is argued by the learned advocate for the respondents that the mortgagee may be entitled to a portion of the income from the date of the commencement of the cultivation up to the date of the notice to him, but that his clients, the plaintiffs were bound only to deposit Rs. 5,728. His argument is that it is not as a mortgagee that he is entitled to the income during this period. We are unable to accept this contention. After the mortgagee accepts the tender under S. 83 of the Transfer of Property Act he is not entitled to claim any further relief as against the mortgagors or the person making the deposit. He is bound to accept the deposit in full settlement of all his claims. If he is not prepared to do it, then he ought to decline to accept the amount deposited and that is the course which the first defendant adopted in this case. We think that he adopted the right course. In fact, there was no other alternative for him to pursue. If the lower Court's finding is correct that the prior mortgagee, the first defendant, was entitled to the income up to the date of his receiving the notice of the petition under S. 83 and he was entitled to it only in his character as a mortgagee there being no tender of that amount, the deposit is not proper. We therefore set aside the decree for mesne profits up to the date of the suit. We think however that the plaintiffs are entitled to the mesne profits from the date of suit up to the date when the harvest was completed. The harvest was completed, according to the evidence of D.W. 1, on the 23rd February, 1939. The plaintiffs will therefore be entitled to mesne profits from the 12th January, 1939, the date of the plaint, up to the 23rd February of that year.

Mr. Ramaswami Aiyangar, the learned advocate for the respondents, then urges that if he is not to get the costs of the action from the first defendant the prior mortgagee, he is at least entitled to do so from the mortgagors or that he is entitled to add, the costs to his mortgage amount under S. 72 (*d*) of the Transfer of Property Act. The mortgagors did not recognise the right of the plaintiffs prior to the suit. They would not register the document which they executed. They issued the notice Ex. J. on the 14th November, 1938. The plaintiffs were therefore justified in filing this suit and the suit is really one for making good their own title to the property as against the mort-

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gagors. The case is therefore covered by the language of S. 72 (*d*) and we consider that they should be allowed to add the amount which is spent for the suit to the principal money secured by their mortgage and to recover it under the provisions of S. 72 of the Act. But they will not be entitled to so add the costs of this Court.

In A.S. No. 328 of 1939 there is also an objection as to the rate of the mesne profits granted by the lower Court. It is said that during the year in question there was scarcity of water and that the first defendant did not realise as much as ten bags of paddy per acre from the tenants. The lower Court has pointed out that apart from the interested statement of the first defendant there is nothing to show that the full amount was not realised by him. We accept the finding of the lower Court on this question.

The result is that A.S. No. 328 of 1939 is allowed except as to the quantum of mesne profits and A.S. No. 372 of 1940 also succeeds. In A.S. No. 328 of 1939 the plaintiffs-respondents will pay the costs of the appellant therein. Otherwise the parties will bear their own costs of this appeal. In A.S. No. 372 of 1940 the respondents will pay the costs of the appellants. The amounts paid to the Court guardians in each case will be added to the costs of the appellants in the respective appeals.

ORDER.—The amount of costs as amended by the lower Court will be added to the mortgage amount.

B. V. V. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Appellate Jurisdiction.*]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

The Indian Hume Pipe Company, Limited .. *Appellants** (*Claimant*)

v.

The Travancore National and Quilon Bank, Ltd. (In Liquidation), by its Official Liquidator .. *Respondents* (*Applicant*).

The Indian Hume Pipe Company, Limited v. The Travancore National and Quilon Bank, Ltd. (In Liquidation), by its Official Liquidator.

Banker and customer—Suspension of payment and liquidation of bank—Realisation of cheque by another branch and suspension of payment by bank before remitting of proceeds to branch where customer had account—Nature of relationship.

Where a cheque was handed over to the Bombay branch of a bank by a company which had a current account with the bank's Nagercoil branch in the Madras Presidency for collection and remission to the Nagercoil branch and the Bombay branch collected the cheque but had not sent the money to Nagercoil before the bank suspended payment,

Held, that as the money had not got into the customer's account at Nagercoil, the bank's position was that of an agent holding his principal's moneys and not that of debtor and creditor. Although branch banks are agencies of one principal firm they may be regarded as distinct trading bodies for certain special purposes of banking business.

English authorities reviewed.

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*O.S.A. No. 16 of 1941. 2nd April, 1942.

The India Hume Pipe Co., Ltd. *v.* The Travancore National and Quilon Bank, Ltd. (In Liquidation), by its Official Liquidator.

On appeal from the order of the Hon'ble Mr. Justice Venkataramana Rao, dated 5th April, 1940 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2324 of 1938 in Claim No. 85 in O.P. No. 158 of 1938.

V. K. Thiruvenkatachari and *S. Ramanatha Davay* for Appellant.

C. Krishnaswami Aiyar instructed by *Messrs. King* and *Partridge* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant company carries on business at Nagercoil in the State of Travancore and at Bombay. The Nagercoil office had a current account with the Travancore National and Quilon Bank, Limited, which suspended business on the 20th June, 1938 and is in the process of liquidation under an order for its compulsory winding up passed by this Court. It will be convenient to refer to the appellant company as 'the Company' and to the Travancore National and Quilon Bank, Limited, as 'the Bank'. The Bank had a branch at Bombay, but the Company had no account there. On the 14th June, 1938, the Company instructed the Bombay branch of the Bank to collect Rs. 5,000, the amount of a cheque drawn in its favour on the Indian Bank at Bombay, and to remit the proceeds to the Nagercoil branch of the Bank to the credit of the Company's account. The cost of collection and remittance was Rs. 4-11-0, which the Company paid. The Bombay branch of the Bank collected the amount of the cheque the next day, but did not carry out its instructions to remit the money to Nagercoil. When the Bank went into liquidation the money remained with its Bombay branch and was never sent to Nagercoil. In these circumstances the Company applied to this Court in the liquidation proceedings for an order directing the Official Liquidators to pay to it the Rs. 5,000 on the ground that it represented money held by the Bank in trust. The application was heard by Venkataramana Rao, J., who was of the opinion that the entrustment of the money to the Bombay branch of the Bank for the purpose of transmission to its Nagercoil branch could not be considered to be money received by the Bank for a special purpose. He regards the position as being one merely between creditor and debtor. The Company has appealed from this order.

S. 229 of the Indian Companies Act makes the insolvency rules applicable in the winding up of an insolvent company. S. 52 of the Presidency Towns Insolvency Act states that the property of the insolvent divisible amongst his creditors shall not comprise, *inter alia,* property held by the insolvent on trust for any other person. This corresponds to S. 38 of the English Act. It is pointed out in Williams on Bankruptcy (Fourteenth Edition, page 244) that trusts, for the purposes of this section, include:

(*a*) Express Trusts and Trusts *virtute officii;*

(*b*) Trusts created by the Bankrupt on what was his own absolute property; and

(*c*) Trusts of agency in the subject-matter of which the Bankrupt had not the general, but only a special property.

The Indian Hume Pipe Co., Ltd. v. The Travancore National and Quilon Bank, Ltd., (In Liquidation), by its Official Liquidator.

It is common ground that if the Bank had paid the Rs. 5,000 into the Company's account at Nagercoil, the Official Liquidators would be entitled to it, but as it never reached that account the appellant says that the case falls within the category (c).

In deciding this question great assistance is to be obtained from certain English decisions, which we will proceed to examine. The first is that in *Toovey* v. *Milne*.[1] There a person advanced to a bankrupt money for the purpose of settling with his creditors. The purpose failed and a part of the money was repaid to the lender. It was held that this re-payment was protected. Abbott, C.J., said that the fair inference from the facts proved was that the money was advanced for a special purpose, and being so clothed with a specific trust, no property in it passed to the Bankrupt.

The principle in *Toovey* v. *Milne*[1] was applied in *Edwards* v. *Glyn*,[2] where the facts were these. A firm of Bankers carried on business at Blandford in Dorsetshire under the style of Oak and Snow. A run on the Bank was anticipated and certain friends of the firm signed a guarantee on the understanding that it should not be used unless the Bankers could clearly see that it would carry them over the crisis. The defendants carried on business as Bankers in London and in that capacity acted as the London agents of Oak and Snow. The defendants advanced to the firm on the security of the guarantee the sum of £3,000 in gold and notes which were placed in a box and handed to Snow. On his return to Blandford the same evening Snow ascertained from his partner that it was hopeless to expect to meet the run the next day and the box containing the £3,000 was retured to the defendants. On the day after the firm suspended payment. It was held by Lord Campbell, C.J and Erle and Crompton, JJ., that there had been no fraudulent preference because in returning the money Snow was influenced by a letter received from one of the sureties stating that as the position of the firm was hopeless they could not safely or honourably retain the money and that it ought to be returned. It was held by Erle and Crompton, JJ., that the money having been obtained for a special purpose, and that purpose having failed, the sureties had an equitable right to the return of the money. In the course of his judgment Crompton, J., said:

"The question does not appear to me to be what the rights of the defendants are, but what the rights of the Bankrupt are in equity as well as law, and whether a third person has an equitable right which prevents the assignees from interfering. This is a perfectly well-known and well-established principle of Bankruptcy Law, and from the decided cases it appears that the principle has been extended to the case of money advanced for a special purpose; and it appears to me that the present falls within the authority of the case before Lord Tenterden (*Toovey* v. *Milne*[1])."

Crompton, J., also said:

"It is a new case, but I think we must look to ascertain whether the Bankrupts had an equitable right to use the money as against all persons. I think equity would have prevented them from using it had there been time to interfere, and so the bankrupts had not the equitable right, but only

1. (1819) 106 E.R. 514: 2 B. & Ald. 683.
2. (1859) 121 E.R. 12: 28 L.J.Q.B. 350.

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the legal right to the possession of the money; and therefore I am of opinion that the money would not pass to the assignees under the principle of Bankrupt Law to which I refer."

The next case is In re *Farrow's Bank*,[1] where the facts are more complicated. On the 16th December, 1920, one Voyce paid into his account at the Birmingham Branch of Farrow's Bank a cheque for £1,493 drawn on the West Bromwich branch of the London Joint City and Midland Bank. Farrow's Bank immediately credited Voyce's account with the amount and sent the cheque to its agents, Barclays Bank, for clearance. On the 17th December Barclays Bank, having presented the cheque at the clearing house to the London Joint City and Midland Bank, remitted the amount to its West Bromwich branch. At the same time Barclays Bank credited Farrow's head office on the clearance sheet, but subject to recourse. On the 18th the West Bromwich branch of the London Joint City and Midland Bank debited the drawer and informed its head office that the cheque had been cleared. On Sunday the 19th December Farrow's Bank suspended payment and all cash remittances received on Monday were returned. At 8-30 A.M. on that day a notice was posted on the doors of the head office of Farrow's Bank stating that payment had been suspended and at 12-15 P.M. instructions to suspend payment were telegraphed to all its branches. When the London Joint City and Midland Bank received information from its West Bromwich branch that the cheque had been cleared it settled with Barclays Bank through the clearing house. This was at 12-30 P.M. Thereupon Barclays Bank informed Farrow's head office that the cheque was cleared. The question was whether the proceeds of the cheque had become part of the general assets of Farrow's Bank and therefore divisible among the creditors or whether Farrow's Bank remained in the position of a mere collecting agent, which meant that the proceeds belonged to Voyce.

The summons was heard by Astbury, J., whose judgment was confirmed by the Court of Appeal. The points decided are concisely stated in the head-note from which the following extracts are taken:

"Where a customer pays a crossed cheque into his Bank, the question whether the Bank receive it as holders for value or as agents for collection is a pure question of fact.

The fact that the cheque is immediately credited in the ledger does not necessarily make the Bank holders for value. That inference may be rebutted by notices in the pass book and paying in slip or other evidence showing that the customer could not draw before clearance.

If the Bank receive the cheque as agents for collection and stop payment before it is finally cleared at the clearing house, they can only receive and hold the proceeds as collecting agents for their customer, and not on the ordinary bank relationship of debtor and creditor."

It was pointed out by Astbury, J., that the moneys were never in fact collected by Farrow's Bank at a time when they were entitled to claim them as part of their assets. In the present case the cheque was collected by the Bank before suspension, but it did not send the money to Nagercoil and it could not claim the proceeds as part of its assets until it had done so.

1. (1923) 1 Ch. 41.

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In *Rex* v. *Lovitt*[1] Lord Robson said that although branch banks are agencies of one principal firm, it is well settled that for certain special purposes of banking business, they may be regarded as distinct trading bodies. So far as the Company was concerned, the Nagercoil and Bombay branches of the Bank were distinct business concerns and the ordinary relationship between a Bank and customer keeping a current account with the Bank never existed between the Company and the Bank in Bombay. Lord Macnaughten in delivering the judgment of the Privy Council in *Capital and Counties Bank* v. *Gordon*[2] pointed out that if a banker before collection credits a customer with the face value of a cheque paid into his account the banker becomes the holder for value of the cheque; but that was never the position here and the principle stated in *Toovey* v. *Milne*[3] and *Edwards* v. *Glyn*[4] applies. Undoubtedly if the money had got into the Company's account at Nagercoil, the Bank's position would no longer have been that of an agent holding his principal's moneys. It would then have been entitled to the control and the use of the money, which would give the Official Liquidators a right to it for the benefit of the general body of creditors. But as the money never got to Nagercoil it belonged to the Company and the Company's money cannot be retained for paying the Bank's creditors. The Official Liquidators must pay it over to the Company.

The appeal is allowed with costs. The Official Liquidators will have their own costs out of the assets of the Bank.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The Public Prosecutor .. *Petitioner**

v.

Rajam Ammal .. *Respondent (Accused).*

Public Prosecutor *v.* Rajam Ammal.

Penal Code (XLV of 1860), S. 75—Previous conviction of child offender—Whether can be taken into account—Madras Children Act (IV of 1920), S. 39—Effect—Madras Borstal Schools Act (V of 1926)—Girl offender—Whether can be sent to Borstal School.

S. 75 of the Indian Penal Code does not impose any disqualification on persons with previous convictions. It only makes permissible a sentence which exceeds the normal sentence for an offence. There is nothing to warrant the conclusion that S. 39 of the Children Act prohibits the Court from taking into account the previous convictions under S. 75 of the Penal Code.

An adolescent girl offender cannot be sent to a Borstal School.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of East Tanjore Division at Negapatam, dated the 30th January, 1942 and passed in Criminal Appeal No. 6 of 1942, preferred against the judgment of the Court of the Sub-Divisional Magistrate of Mayavaram in Calendar Case No. 163 of 1941.

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1. (1912) A.C. 212.
2. (1903) A.C. 240.
3. (1819) 106 E.R. 514: 2 B. & Ald. 683.
4. (1859) 121 E.R. 12: 28 L.J.Q.B. 350.

* Crl.R.C. No. 231 of 1942. 30th June, 1942.
(Crl.R.P. No. 217 of 1942).

N. Somasundaram for Petitioner.

Respondent not represented.

The Court made the following

ORDER.—Rajam Ammal was convicted by the Sub-Divisional Magistrate of Mayavaram of an offence punishable under S. 380, Indian Penal Code. She was a young woman of about 16 or 17 years of age at the time of her conviction. As she had had three previous convictions for which she had received three minor terms under the Children Act, the Magistrate realised that it would have been very desirable if Rajam could have been sent to a Borstal School; but he felt himself unable to pass an order to that effect because Borstal Schools are for boys only. He therefore sentenced her to nine months' rigorous imprisonment. In appeal, the learned Sessions Judge seemed to think that the fact that in practice Borstal Schools are only for boys should not be an impediment to the passing of an order by the Court that the girl should be committed to a Borstal School. He passed an order accordingly. When the Sessions Judge made the usual reference to the Government asking them to make arrangements for the custody of this girl in a Borstal School, the Government instructed the Public Prosecutor to file a Civil Revision Petition in this Court to have the order of the Sessions Judge revised on the ground that it was an illegal order.

S. 2 of the Borstal Schools Act says that the Provincial Government may, by notification from time to time, apply the whole or any of the provisions of this Act to adolescent offenders or any class thereof in any local area in the Presidency of Madras. . . . By Law (General) Department notification No. 64, dated the 26th January, 1927, published in page 210 of part I of the *Fort St. George Gazette,* dated the 1st February, 1927, the Act was made applicable to adolescent offenders of the male sex. That means that Rajam cannot be ordered to be sent to a Borstal School.

As adolescent girls cannot be sent to a Borstal School, some arrangement is presumably made in the women's jail at Vellore for segregating adolescent offenders from the hardened adult ones. In any event, that is a matter for the Government to arrange and the Court can only impose such sentences as it thinks proper and leave the Government to make such arrangements as are possible for the protection of adolescents.

The learned Sessions Judge further seemed to think that the three previous convictions of Rajam Ammal cannot be taken into account under S. 75, Indian Penal Code, because he thought S. 39 of the Children Act prohibited that. The scope of S. 39 is however not so extensive. It says that the conviction of a child or young person shall not be regarded as a conviction *for the purposes of any disqualification* attaching to a conviction for any offence. S. 75, Indian Penal Code, does not impose any disqualification on persons with previous convictions. It only makes permissible a sentence which exceeds the normal sentence for an offence. However, this question does not directly arise here because an offence under S. 380, Indian Penal Code, is punishable

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with seven years' rigorous imprisonment and the sentence imposed on Rajam is only nine months' rigorous imprisonment.

I cannot think of any better sentence than that which the Sub-Divisional Magistrate imposed. A very short term would be out of place. It would not act as a deterrent and would not afford any opportunity for her education or for any corrective treatment to be applied, such as is possible when a prisoner is sentenced to a longer term.

The sentence imposed by the Sessions Judge is therefore set aside and that imposed by the Sub-Divisional Magistrate restored.

B.V.V. ——— *Sentence modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

V. Balakrishna Naidu .. *Petitioner** (*Respondent*)

v.

Mrs. B. Sakuntala Bai .. *Respondent* (*Petitioner*).

Balakrishna Naidu v. Sakuntala Bai.

Criminal Procedure Code (*V of* 1898), *S.* 488 (8)—*"Reside"—Meaning of—Parties permanently residing in native state—Casual visit to place in British India—Ill-treatment of wife by husband at that place—Application by wife for separate maintenance—Jurisdiction of British Indian Court—S.* 531—*Scope.*

The expression "reside" in S. 488 (8), Criminal Procedure Code, implies something more than "stay". It implies some intention to remain at a place and not merely to pay it a casual visit intending shortly to move on to one's permanent residence.

The petitioner, who was employed in the Mysore State, was a permament resident in the Bangalore Civil and Military Station. The petitioner and his wife, the respondent, paid a short visit to Ceylon and on their return halted at Trichinopoly for a few days and they stayed in the house of the petitioner's brother. During that time the petitioner ill-treated his wife and drove her out of the house and she thereupon went to her father's house. As a result of what happened in Trichinopoly the wife brought an application for maintenance in the Court of the Sub-Divisional Magistrate of Trichinopoly. The Magistrate held that cruelty was proved and awarded the wife separate maintenance. It was contended in revision that the Sub-Divisional Magistrate of Trichinopoly had no jurisdiction to entertain the case as the petitioner was not residing at that place.

Held, that as the visit to Trichinopoly was merely a casual one and as the residence of the petitioner when he ill-treated his wife was Bangalore and not Trichinopoly the Sub-Divisional Magistrate of Trichinopoly had no jurisdiction to entertain the application of the wife for separate maintenance.

Held, further, that the defect as to jurisdiction was not curable by S. 531, Criminal Procedure Code, as that section will apply only to inquiries in British India where a British Indian Court wrongfully exercises jurisdiction, and not where a foreign Court is vested with the jurisdiction to decide the case.

Charan Das v. *Surasti Bai,* I.L.R. (1940) Lah. 755: A.I.R. 1940 L. 449, *Krishnaswamy Iyer* v. *Subbulakshmi Ammal,* 1935 M.W.N. 475, considered.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate

* Crl.R.C. No. 679 of 1941. (Crl.R.P. No. 638 of 1941.) 10th December, 1941.

of Trichinopoly, dated the 27th March, 1941 and passed in M.C. No. 98 of 1940.

Balakrishna Naidu v. Sakuntala Bai.

A. Viswanatha Aiyar for Petitioner.

K. G. Srinivasa Aiyar for Respondent.

K. Venkataraghavachariar for the Public Prosecutor for the Crown.

The Court made the following

ORDER.—The petitioner was an Assistant Engineer in the Mysore State for 9 years. He then took service with the Ceylon Government; but after sometime gave up that post because his wife (the petitioner in the lower Court) refused to live with him there. He then returned to his old post in Mysore and rented a house in the Bangalore Civil and Military Station. Although he and his wife had not been getting on well for many years, she consented to come and live with him in Bangalore after Panchayatdars had mediated between them. She had been there for about two months, when the petitioner who had left her jewels in Ceylon because he apprehended that he would have to pay customs duty if he brought them back to India with him, persuaded his wife to accompany him back to Ceylon and wear the jewels; for by her so doing, they could avoid paying duty on them. On their return from this short visit to Ceylon, they halted at Trichinopoly, where both the brother of the petitioner and her father live, and went to stay in the house of the petitioner's brother. During the few days they remained there, the petitioner ill-treated his wife—the Magistrate finds—and drove her out of the house. She then went to her father's house. On the following day, the husband, with the help of some friends and servants, attempted to abduct her from her father's house; but failing in their attempt, assaulted her. The petitioner then returned to his duties in the Mysore State. As a result of what happened in Trichinopoly, the wife brought an application for maintenance in the Court of the Sub-Divisional Magistrate at Trichinopoly. The Magistrate was satisfied that the wife had proved cruelty against her husband and that she was therefore entitled to separate maintenance. He awarded her Rs. 50 a month.

We cannot go behind the finding of fact of the Sub-Divisional Magistrate, which is reasonable on the evidence; and so Mr. Viswanatha Aiyar has confined his arguments to the question of the jurisdiction of the Sub-Divisional Magistrate of Trichinopoly to award maintenance under S. 488, Criminal Procedure Code. S. 488, clause (8), says that "proceedings under that section may be taken against any person in any District where he resides or is, or where he last resided with his wife ...." The question is whether during those four days in which the petitioner was staying at Trichinopoly, he was residing there with his wife? I have been taken through the evidence of the husband and of the wife and there can be no doubt that the petitioner intended returning to his house in Bangalore with his wife and resuming his duties as Assistant Engineer in the Mysore State. The expression 'reside' implies something more

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than 'stay'. It is defined in the Oxford Dictionary as "to dwell permanently or for a considerable time; to have one's settled or usual abode; to live in or at a particular place." The word therefore implies some intention to remain at a place and not merely to pay it a casual visit, intending shortly to move on to one's permanent residence. This is the purport of the decision of a Bench of the Lahore High Court in *Charan Das* v. *Surasti Bai*.[1] The lower Court considered that the petitioner had no permanent place of residence; for wherever the petitioner went in the Mysore State he lived in a rented house and it was in a rented house that he lived in Bangalore. The learned Magistrate concluded that as the petitioner had no permanent place of residence, he must be deemed to have resided wherever he stayed. He stayed last at Trichinopoly; and so last resided in that town. The Magistrate's reasoning cannot however be accepted. A person who follows a profession must necessarily have some place of residence in which he can keep his wife and family and store his furniture and goods and to which he can return when he is not on tour. He can as well be said to reside in a rented house as in a house of which he is the owner. There can be little doubt that the petitioner had made Bangalore his home before he visited Trichinopoly and intended to continue to reside there. His visit to Trichinopoly was clearly a casual one, in order that the parties might see their relatives on their way from Ceylon to Bangalore. The residence of the petitioner at the time when he ill-treated his wife was therefore Bangalore and not Trichinopoly; and that was where the petitioner last resided with his wife at the time when the application for maintenance was filed.

I have been referred to a decision of Burn, J., in *Krishnaswamy Iyer* v. *Subbulakshmi Ammal*,[2] in a case something like the present one. The husband in that case had his work in a place other than that in which the enquiry took place; but there were important circumstances then existing which are not to be found in this one which led Burn, J., to hold that the husband was residing in the town he visited. The husband's native place was Trichinopoly; he had two houses and lands there, and he used to visit that town whenever he had sufficient leave. He had left his wife in Trichinopoly at her father's house and he went there and stayed with her for some days. The present petitioner's ancestral house is in Mysore and he has no house or other property in Trichinopoly.

The Magistrate therefore had no jurisdiction to try this case; but the learned Magistrate seems to have thought that even if that were so, the lack of jurisdiction would not nullify his order. He quoted S. 531, Criminal Procedure Code, which says that "No order of any Criminal Court shall be set aside merely on the ground that the............proceeding in the course of which it was arrived at........took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice." I agree that in this case there was no failure of justice; but S. 531 is

1. I.L.R. (1940) Lah. 755: A.I.R. 1940 Lah. 449.
2. 1935 M.W.N. 475.

naturally intended to apply only to inquiries in British India; for the Criminal Procedure Code applies only to British India. It certainly does not condone the wrongful exercise of jurisdiction by a British Indian Court when no British Indian Court would have jurisdiction in the matter. If it were otherwise, a person, by instituting a proceeding in a British Indian Court might obtain a remedy that was not open to him in the Court having jurisdiction. If authority for this position be necessary, it is found in *In the matter of Bichitranand Das* v. *Bhugbut Perai*.[1] Bangalore is within the Mysore State and so the Bangalore Courts—even those in the Civil and Military Station—are foreign Courts. S. 531, Criminal Procedure Code will therefore not cure any defect in jurisdiction in the Sub-Divisional Magistrate who passed this order.

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The order of the Magistrate is therefore set aside as one without jurisdiction.

B.V.V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN AND MR. JUSTICE SOMAYYA.

K. T. M. Ahmed Kasim Sahib .. *Appellant** (*1st Claimant*)

v.

Land Acquisition Officer (Sub-Collector) Ramnad division at Ramnad .. *Respondent* (*Petitioner*).

Land Acquisition Act (I of 1894)—Value of land acquired—Mode of determining—Value of land in the vicinity—Sale-deed executed after notification—Agreement for sale entered into earlier—Admissibility of sale-deed.

Ahmed Kasim Sahib v. Land Acquisition Officer, Ramnad.

In a land acquisition proceeding the owner of the land relied on a sale-deed relating to land in the vicinity of his land executed a day after the notification in the Gazette. It was proved that the deed was executed in pursuance of an agreement entered into before the notification and that in pursuance of the said agreement earnest money was paid by the vendee.

Held, that the document was not only relevant but was good evidence of the market value of the land on the date on which the notification was issued.

Assistant Development Officer, Trombay, v. *Tayaballi*, (1933) 35 Bom.L.R. 763 relied on.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, dated 18th April, 1939, and passed in O.P. No. 33 of 1936.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for *Respondent.*

The Judgment of the Court was delivered by

Abdur Rahman, J.—A notification was issued under the Land Acquisition Act for the acquisition of a strip of land of 861 sq. feet in the area situate at the junction of the bazaar and the Railway feeder roads at Ramnad. This plot belonged to the

Abddur Rahman, J.

1. (1889) I.L.R. 16 Cal. 667.

*Appeal No. 147 of 1940. 11th March, 1942.

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Abdur Rahman, J.

appellant. Eleven small shops were in existence on the strip of land at the time when the notification was issued. Having regard to the income that was being got by the appellant from them he put forward a claim for Rs. 17-8-0 per square feet. The land acquisition authorities however came to the conclusion that a rupee per square foot would be enough for this land and an award was made at that rate. Not being satisfied with the order the appellant applied to the Subordinate Judge of Ramnad at Madura and again repeated his claim for Rs. 17-8-0 per square foot. The Subordinate Judge agreed with the land acquisition authorities and rejected his claim. He has now come up in appeal.

After hearing learned counsel for the parties there is not much room for doubt that the award of the Sub-Collector was unreasonably low and the Court does not seem to have paid sufficient attention to the materials on the record. Even from Ex. K which was the report of the Revenue Inspector made in connection with the land acquisition proceedings of this very plot it would be clear that on an examination of the various transactions which have been referred to by him in the report, he was of the view that Rs. 7-11-5 per square foot would be the average value for a plot situate in the same locality. This report was before the Collector and no sufficient reasons were given by the Sub-Collector or by the Tasildar for disregarding the estimate of the value suggested by the Revenue Inspector on the 30th June, 1936. It is admitted in this report that the site acquired was situated in the busiest part of the whole town. The Revenue Inspector was examined as a witness on behalf of the Government and affirmed the contents of Ex. K in his examination in chief itself. Nothing has been brought out either in his statement or in the statement of the other witnesses examined on behalf of the Government which would detract from the value of his evidence on that point. Reliance was placed on behalf of the appellant on a number of other transactions between 1924 and 1929, in regard to plots marked IV, I, III, II, VII and VIII in the plan Ex. J. According to the evidence tendered on his behalf the value of land in that locality appears to be ranging between Rs. 7 and Rs. 12 per square foot. There is no evidence on the record to show that the value of this type of property had gone down between 1929 and 1935, when the notification for acquisition was issued on behalf of the Goverment. In fact, a transaction embodied in a sale-deed Ex. E executed on the very next day after the notification if read along with the statement of C.W. 3 about the valuation of the buildings situated on those sites would seem to indicate that the value of the sites in the plots numbered as VII and VIII in Ex. J was not less than Rs. 12 per square foot. The statement by this witness in regard to his capacity to form a correct estimate of the value of the sites or in respect of the value assessed by him both for the buildings erected on those sites and for the value of the sites was not challenged in cross-examination. If that evidence is accepted—and we have no other option in the circumstances but to do so—the estimate of the value given by him would compare very favour-

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ably with the value deduced from the documents referring to other transactions in the same locality between 1922 and 1929. It was faintly suggested that the sale-deed Ex E might not be admissible in evidence as it came into existence a day after the notification was issued by the Government. We see, however, no reason to accept that suggestion. This document was first of all admitted with the consent of the counsel for the Government and without any objection. It could not therefore be allowed to be questioned on that ground. But even if it was, there is really no reason why a transaction which came into existence so shortly after the notification should not be admitted in evidence and taken into consideration. There is nothing to suggest that it was brought about with the object of supporting the claim made on behalf of the appellant. The recitals in this document show that the agreement to sell was entered into on the 24th May, 1935, when earnest money was paid by the vendee. This was before the notification although the sale-deed was executed a day after and registered five days later. Had any objection been raised in regard to the relevancy of this document, evidence could have been adduced that the contract had been entered into on the 24th May, 1935. A document such as this is in our opinion not only relevant but good evidence of the market value of the land on the date on which the notification was issued and but for the fact that the land is situated at a little distance from the site acquired by the Government the value given in the document would have proved a very good guide to arrive at the value of the site acquired by the Government. Referring to the post notification transactions, Mr. Justice Broomfield in *Assistant Development Officer, Trombay* v. *Tayaballi*,[1] *observed as follows*:

> "Nevertheless I doubt if anything can be found in these authorities which would justify the conclusion that post notification transactions must necessarily be ignored altogether. All transactions must be relevant which can fairly be said to afford a fair criterion of the value of the property as at the date of the notification. If any considerable interval has elapsed the Court will naturally attach little or no value to subsequent sales just as transactions long prior to the notification will usually be discarded........ But transactions only a month or two after the notification may sometimes perhaps have some value as evidence."

We find ourselves in respectful agreement with what fell from the learned Judge and hold that the sale deed Ex. E is admissible in evidence.

In dealing with this property the learned Subordinate Judge considered the plot to be acquired as one situated on the feeder road. But he overlooked the very important fact which he had himself referred to at the beginning of his judgment that it was situate both on the bazaar road and on the feeder road. This enhances the value of the plot to be acquired, and the value of the other properties on the Bazaar road cannot therefore be omitted from consideration.

Having regard to the value of the various properties dealt with under Ex. G, Ex. D, Ex. F, Ex. E, Ex. H and the transactions referred to by the Revenue Inspector in Ex. K and after making allowance for the exaggeration in regard to the under-

1. (1933) 35 Bom.L.R. 763.

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valuation of the buildings in the statements of the witnesses for the claimant, we are on the whole of opinion that a sum of Rs. 7 per square foot at least should have been allowed to the claimant in regard to the land acquired from him. To that extent the appeal must be accepted. The value of the land acquired would thus be enhanced by Rs. 6 per square foot. To this the usual compulsory solatium of 15 per cent will be added. No objection was raised as to the value of the structure and that will remain the same. This amount will now be deposited following the directions given by the lower Court. As for the costs the claim of the appellant in the present appeal could not be regarded in any way to be extravagant and he would therefore get his full costs in this appeal. As for the costs in the lower Court we are of the opinion that in so far as the claim in that Court was exaggerated the parties should bear their own costs in that Court. Time for payment three months. The appellant is entitled to interest on the excess amount awarded by this judgment at six per cent. from the date when the Government took possession.

B. V. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

M. K. Rangai Goundan *Petitioner*-Appellant (Accused).*

Rangai Goundan, In re.

Indian Companies Act (VII of 1913) Ss. 236 and 282—Voluntary liquidation of company—Liquidator making false returns and entries in account books—Conviction and sentence—Legality of.

The Secretary of a certain bank, which went into voluntary liquidation, was appointed as the liquidator and he had in accordance with his duties as liquidator to send periodical returns under S. 244 of the Indian Companies Act. He was charged under S. 282 of the Act for sending a false periodical return and under S. 236 for falsifying the accounts. He was convicted and sentenced to imprisonment as well as fine. On the question of the correctness of the convictions,

Held, that any wrongful Act done by the liquidator was a wrongful act done by him as an officer of the company. Also by his mere appointment as liquidator the accused had not ceased to be a director. Hence whether as officer or director, S. 236 would apply to him.

The liquidator referred to in S. 282 is presumably the *de facto* liquidator and even if the accused was not legally appointed due to the want of quorum at the meeting appointing him as liquidator, the conviction under S. 282 is proper, he having acted in accordance with the powers granted to him.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of Coimbatore Division dated 30th September, 1941 and passed in C.A. No. 105 of 1941 preferred against the judgment of the Court of the Sub-Divisional First Class Magistrate, Coimbatore, dated 10th September, 1940, and passed in C.C. No. 205 of 1941.

K. S. Jayarama Aiyar and *G. Gopalaswami* for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor for Crown.

*Cr.R.C. No. 916 of 1941. 11th March, 1942.
Cr.R.P. No. 862 of 1941.
Criminal Appeal No. 20 of 1942.

Rangai Goundan, *In re.*

JUDGMENT.—The Okkaliga Mahajana Bank Limited, Karamadai went into voluntary liquidation on 15th June, 1934, on an extraordinary resolution passed by it; and the company appointed the accused, who was the secretary of the company, as the liquidator. He performed the duties of the liquidator, and in accordance with those duties he had to send in periodical returns of the position of the company as required by S. 244 of the Indian Companies Act. He showed the assets of the company as Rs. 53,010-12-0 and liabilities as Rs. 36,465-2-2 in all of his returns. On 19th June, 1935, he made certain entries in the accounts which rendered the subsequent periodical statements incorrect. He owed to the company a sum of Rs. 33,600, on a promissory note; and on 19th June, 1935, he showed that amount on the credit side. On 20th March, 1935, he showed on the debit side as share capital—K. Kampai Goundar Rs. 2,000 and share capital—K. Ramaswami Goundar Rs. 2,000, these persons being his uncle and brother respectively. Against the date 19th June, 1935, he showed a debit entry of Rs. 6,000 for his own shares, Rs. 1,125 for his own current account, Rs. 3,000 as having been paid to the Karamadai Ranganathaswami Devasthanam, a Fixed Deposit of Rs. 6,000 to the Coimbatore Janopakara Nidhi; and another item of Rs. 400 towards a Fixed Deposit in the Okkaliga Mahajana Bank (possibly his own). He also showed various other payments by way of interest, then debited the Bank with Rs. 660 as unpaid salary due to himself and the remainder necessary to balance these various items against the credit item of Rs. 33,600, he entered as "Bad debts written off"—Rs. 11,974-2-0.

The accused was first prosecuted in the Court of the Sub-Divisional First Class Magistrate of Coimbatore under S. 282 of the Indian Companies Act, for sending a false periodical return and again before the Sessions Judge of Coimbatore under S. 236 of the Act for falsifying the accounts. He was convicted by both the Sub-Divisional Magistrate and by the Sessions Judge of these offences, and was sentenced to six months rigorous imprisonment and a fine of Rs. 250 with a further period of three months rigorous imprisonment in default of payment of the fine, and two years rigorous imprisonment respectively, the Sessions Judge making his sentence to run concurrently with the sentence imposed by the Sub-Divisional Magistrate. The accused appealed against the conviction by the Sub-Divisional Magistrate; and the appeal was heard by the Additional Sessions Judge of Coimbatore, who affirmed the conviction and sentence. These two matters have now come up before this Court in revision against the order of the Additional Sessions Judge of Coimbatore dismissing the appeal and also by way of a regular appeal against the conviction and sentence by the Sessions Judge of Coimbatore.

It is not quite certain from the records in the Courts below what exactly the case of the accused was. He stated before the Committing Magistrate "I did not do anything fraudulently. I did so for the benefit of the Bank." As the learned Sessions Judge says, this reads as if the accused admitted that he was res-

ponsible for these entries; but that he pleaded that he had done so in the best interests of the Bank. In the Sessions Court he said,

"There was a proposal for holding a general meeting for winding up the Bank, but as there was no quorum nothing could be done. Subsequently I did no transaction on behalf of the Bank. I do not know who made the entries in the books after 1934."

The learned Sessions Judge naturally took this to be a plea that he did not know anything about it. In this Court, the learned advocate for the accused has made it clear that the case of the accused is that although he did not actually write these accounts, he did know what was written, that they were written with his authority, that those entries were correct even though some of the transactions were unauthorised, and that the accounts were not false. The balance sheet he admits to be incorrect, but pleads that it was sent in negligently in the same form with the same figures without any dishonest motive.

There is no doubt in my mind that looking at the accounts as a whole, the accused did intend to write off his own debt by making the entries he did in the accounts, that he knew that he had no authority to do so, and that he made those entries with the dishonest purpose of avoiding payment of his debt. I have no doubt too that the purpose of sending in the periodical returns in the same form throughout was to conceal from the Registrar and persons likely to see those periodical returns the fact that he had made these dishonest entries in the accounts. That is what the Sub-Divisional Magistrate found; and I have no doubt that he was right.

It is argued that the charges in these two cases were inconsistent, because if the entries in the accounts were false, then the periodical return was true; and so the accused could not be found guilty of both offences. It is also argued that there is no reason to believe that the entries in the accounts of 20th March, 1935, and on 19th June, 1935, were not true. It is pointed out that the prosecution has not let in any evidence to show that the creditors mentioned therein were not actually paid. It is further contended that although the accused as a liquidator had no authority either to write off share capital and credit it against debts or to write off the balance of his own debt against sums due to creditors and to shareholders, yet the entries corresponded with real transactions, and so cannot be false entries. There is something to be said for this last argument as far as the debts, and perhaps also the writing off of share capital and the sum due to the accused on current account are concerned; but I do not agree that the writing off as a bad debt the balance of Rs. 11,974-2-0 due by the accused is a real transaction. I do not believe that the accused even purported to exercise an authority to write off a part of his own debt. He had written off against his own debt of Rs. 33,600 as many individual items of shares and debts as he could think of; and if he was to balance his accounts he had to enter this sum of Rs. 11,974-2-0. Something had to be written against that figure; and "Bad debts written off" was apparently the best that

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the accused could think of. At least with regard to this sum of Rs. 11,974-2-0, therefore, the account of 19th June, 1935, was false as well as dishonest; and the accused was therefore properly convicted by the Sessions Judge. If, as the accused contends, the other entries are true entries, then the accused was also guilty of an offence under S. 282 of the Act. The latter conviction, however, is of little importance; because the sentence was six months' rigorous imprisonment and a fine of Rs. 250 with rigorous imprisonment for three months in default of payment, which was to run concurrently with the larger sentence imposed by the Sessions Judge.

It has been argued with regard to the offence under S. 236 read with S. 282 of the Companies Act that the accused was not a director or manager or an officer or contributory and therefore could not be found guilty under that section. It was argued that although he was once a director of the company, he ceased to be one when once liquidation proceedings had begun. S. 208-A (2) says that on the appointment of a liquidator all the powers of a director cease except so far as the company in general meeting or the liquidator sanctions the continuance thereof. The wording of this section thus indicates that although the director loses most of his powers, he does not cease to be a director. Moreover, the liquidator is an officer of the Company. That was held in *In re, Windsor Steam Coal Co.* (1901).[1] The accused was also a contributory. So whether as director, officer, or contributory, S. 236 would apply to the accused.

With regard to the conviction under S. 282, it is argued that the accused was not legally appointed as liquidator, because at the extraordinary general meeting at which a resolution was passed there was no proper quorum, the quorum being ten and only nine persons attending. The accused explained in reply to a letter from the Registrar on this point that he held a proxy from another director which made the quorum. Even if there had been no quorum, I still think that the accused was properly convicted under S. 282; for the liquidator referred to in that section is presumably the *de facto* liquidator. A person who accepts an appointment as liquidator of a company and who has acted in accordance with the powers granted to him, must be deemed to have accepted the duties and responsibilities of that office and so any wrongful act done by him was a wrongful act done by him as liquidator. This view was held by Mr. Justice Walsh in *Emperor* v. *Satis Chandra Ghose.*[2] *J. C. De* v. *K. B. Roy Chowdry,*[3] has been quoted as an authority for the opposite view; but the question that calls for decision here did not arise in that case however. There, there was scarcely any pretence of an extraordinary resolution that the company should go into voluntary liquidation. No notice had been sent to the directors or to the members; and the agenda made no reference to the bringing up of this subject. During the course of the winding up, the liqui-

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1. (1929) 1 Ch. 151.
2. (1917) I.L.R. 39 All. 412.
3. A.I.R. 1934 Rang. 271.

Rangai Goundan, *In re.*

dator applied to the Court for directions to examine the directors; and it was held by the learned Judge that as the company had not passed any valid resolution that it could not, by reason of its liabilities, continue its business and that it was advisable to wind up, the company was not in voluntary liquidation at all; there was therefore no liquidation, and the liquidator had no authority to do any of the acts ordinarily permitted to a liquidator. The application to the Court was then opposed by members of the company; but in the present case, as far as we know, all the members of the company approved of the voluntary winding up, everything was regular with the possible exception of the quorum, for which the accused gave a reasonable explanation. There can be no doubt that the accused always acted as if he was the liquidator; and every act he did purported to be done in the exercise of that power freely conferred by the members of the company at a meeting properly convened for the purpose of winding up the company.

The only remaining question is that of sentence. There can be no doubt that the accused committed a serious offence by making these entries in his account books. He was able to secure himself against all action for the recovery of the large debt due by him; and there can be no doubt that throughout he was actuated by a dishonest motive in concealing the fact that this debt was shown as paid off. Had it not been for the fact that another liquidator was subsequently appointed by this Court because of the unsatisfactory manner in which the company was being wound up by the accused, this fraudulent transaction of the accused would never have come to light. On the other hand, it is argued that this offence took place nearly six years ago and that the accused could easily have avoided liability by filing an insolvency petition for he had no money with which he could have met his obligation. The accused has already been subjected to two trials and has served more than six months in jail; and I do not think the interests of justice require a further long term of imprisonment. There is still due from him a fine of Rs. 250 in default of payment of which he will have to undergo a further period of three months rigorous imprisonment.

The conviction and sentence of the Sub-Divisional Magistrate under S. 282 of the Indian Companies Act are affirmed and the revision petition dismissed. The conviction by the Sessions Judge under S. 236 of the Act is affirmed and the sentence reduced to the period already undergone. The accused will undergo the default sentence imposed by the Sub-Divisional Magistrate under S. 282 of the Act if he does not pay the fine within a month of this date.

K. C. *Conviction affirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

P. C. Kandaswamy Pillai .. *Petitioner** *(Accused)*

v.

Municipal Prosecutor, Palghat .. *Respondent* *(Complainant)*.

Kandaswam Pillai *v.* Municipal Prosecutor, alghat.

Madras District Municipalities Act (*V of* 1920), *S.* 181—*Encroachment—Meaning of—Window encroaching on road when swung open or closed—No encroachment when fastened—Liability of owner of house to conviction under S.* 181 (2).

By enroachment is generally understood something that hangs more or less permanently over the road and not something which momentarily passes over some portion of the road. What is prohibited under S. 181 of the Madras District Municipalities Act is the erecting without licence of a window, door, gate or bar that, when in its normal open position, projects over the street,

The petitioner constructed a window, the panels of which when swung open passed six inches beyond the road boundary. It was found that when the window was fastened back it did not project over the road, nor did it when it was shut.

Held, that the swinging over the road when the window was opened or closed was not an encroachment so as to fall within the mischief of S. 181 of the Act, and that the petitioner was not liable to be convicted thereunder.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the first class Bench Magistrates of Palghat, dated 5th February, 1942, and passed in Serial No. 1803 of 1941.

S. V. Venkatasubramaniam for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor for the Crown.

The Court made the following

ORDER.—The petitioner constructed a window, the panels of which when swung open passed six inches beyond the road boundary. He was therefore called upon by the executive authority of the Palghat Municipality under S. 181 (2) of the District Municipalities Act to alter the window so that no part of it when open projected over the street. As he did not do so, he has been prosecuted and convicted and ordered to pay a fine of Re. 1.

The surveyor reported that when the window was fastened back it did not project over the road, nor did it when it was shut. It was only in the process of opening and shutting that the panels of the window swung over a small area of the street. The question is (1) whether that swinging over the road for a moment or two would amount to an encroachment and (2) whether, more specifically, it came within the mischief of S. 181 (2) of the Act. By an encroachment is generally understood something that hangs more or less permanently over the road and not something which momentarily passes over some

*Crl.R.C.No. 178 of 1942. (Crl.R.P. No. 165 of 1942). 1st July, 1942.

Kandaswamy Pillai v. Municipal Prosecutor, Palghat.

portion of the road. It also appears from the wording of S. 181 that what is prohibited there is the erecting without licence of a window, door, gate, or bar that, when in its normal open position, projects over the street. The position of the window in question when it is open is parallel to or almost parallel to the wall, and so would appear not to be hit by this section, which deals with windows etc. which in their normal open position project over the road.

In allowing this appeal and ordering the fine to be refunded, I leave open the question whether, if it should be subsequently found that the window in question does project over the road longer than is necessary for the opening and shutting of the window, the petitioner would contravene the provisions of the Act.

B.V.V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Dakshinamurthi .. *Petitioner** (*Accused*).

Dakshinamurthi, *In re.*

Criminal Procedure Code (V of 1898), S. 370 (1)—Need for compliance—Defence evidence adduced—Same not referred to in judgment—Magistrates merely relying on prosecution evidence—Legality.

Where the Magistrates in convicting the accused merely said that they believed the prosecution witnesses without noting what they said and without any reference to the defence evidence.

Held, that the judgment was bad for non-compliance with the provisions of S. 370 (1) Criminal Procedure Code. If there had been no defence witnesses, it would then have been sufficient if the Magistrates had said that they believed the prosecution witnesses, but when there is defence evidence which is inconsistent with the prosecution story, some brief reasons should also be given why the defence evidence should be discredited.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Honorary Presidency Magistrates, Egmore, Madras, dated 28th February, 1942, and made in N.C. No. 665 of 1942.

B. T. Sundararajan for the Petitioner.

K. V. Ramaseshan for the Crown Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—This petition was admitted because the learned Magistrates did not comply with the requirements of S. 370 (1) of the Code of Criminal Procedure. They should have given a brief statement of the reasons for the conviction. They merely said that they believed the prosecution witnesses without noting what the prosecution witnesses said and without any reference to the defence evidence. A brief statement of the reasons for conviction would necessitate a reference to what the prosecution witnesses had said, so that it could be shown that that evidence if believed would establish the offence with which the accused had been charged. If there had been no defence witnesses, it

*Crl.R.C. No. 192 of 1942 (Crl.R.P. No. 179 of 1942). 30th June, 1942.

Dakshinamurthi. *In re.*

would then have been sufficient if the Magistrates had said that they believed the prosecution witnesses; but when there is defence evidence which is inconsistent with the prosecution story, some brief reasons should also be given why the defence evidence should be discredited.

As this petition was admitted I had either to send the case back again for the Magistrates to give a brief statement of reasons as required by S. 370 (1) or to read through the evidence myself and decide whether the conviction was justified by the evidence. The vacation has intervened since this petition was admitted, and it is perhaps unlikely that after more than four months have expired the Magistrates would remember very much about what the witnesses said. I have therefore been compelled to perform a duty which the Magistrates themselves should have performed. When the records were called for from the Presidency Magistrates, they could themselves have submitted a report under S. 441 of the Code of Criminal Procedure. If that had been done and the report had remedied the defect in the original order, it would not have been necessary for anything further to have been done by this Court, as was the case in *In re, Dervish Hussain.*[1] That unfortunately was not done.

I have been through the evidence and I see no reason why the evidence of P.Ws. 2 and 3 should not be believed. It is usually not difficult to get a friend or two to support one when one is in difficulty. The two defence witnesses were interested in the accused, and I think that interest a sufficient reason for not accepting their evidence in rebuttal of the evidence of the prosecution witnesses.

Had the order of the Magistrates been in accordance with the requirements of S. 370 (1) of the Code of Criminal Procedure, I in all probability would not have interfered with the sentence; but after going through all the evidence, I feel the sentence is excessive; for it is almost the maximum sentence that could be imposed. S. 75 of the City Police Act provides for a maximum punishment of one month's R.I. or a fine of Rs. 50 or both. The punishment imposed was one month's R.I. and a fine of Rs. 25. That seems to me to be a very severe sentence for conduct that was not very disorderly. It is true that four years ago the accused was fined one rupee for a similar offence; but that is no sufficient reason for the imposing of such a heavy sentence as has in this case been imposed. The accused was eight days in jail before he was released on bail by this Court, and I feel that that is ample punishment for the offence committed by him. The imprisonment is therefore reduced to the term already undergone and the order for payment of fine set aside. The order under S. 106 of the Code of Criminal Procedure is unobjectionable in the circumstances and will stand.

B. V. V. ——— *Sentence reduced.*

1. (1922) 44 M.L.J. 84: I.L.R. 46 Mad. 253.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR.

T. K. Embaru .. 2nd Defendant* (Applicant).

v.

Vedavalli Ammal .. Plaintiff (Respondent).

Embaru v. Vedavalli Ammal.

Madras High Court Rules (Original Side), O. 13, R. 9 and O. 18, R. 8—Leave to bid—Order of Master—Whether ministerial act—Appeal therefrom to Judge—Maintainability.

In granting leave to bid the Master is not exercising a judicial but merely an administrative or ministerial function and Order XIII, Rule 19 of the Madras High Court Original Side Rules does not permit an appeal from such an order.

The general rule is that leave to bid is not to be granted unless the decree-holder is prepared to bid for not less than the amount due to him for principal, interest and costs, and that that course should be followed unless the Court otherwise orders. Before the Court "otherwise orders" it should take into account the facts and circumstances of the case. And when the Court in granting or refusing leave to bid is acting in a ministerial capacity the mere fact that certain considerations have to be taken into account before making its order is not a good reason for holding that the order becomes a judicial one.

Even when a Court acts in a ministerial capacity it does not mean that the Court is entitled to act arbitrarily.

V. V. Srinivasa Aiyangar instructed by *V. Sundararajan* for *Applicant.*

N. Panchanatha Ayyar for Respondent.

The Court delivered the following

JUDGMENT.—A preliminary objection is taken to the maintainability of this appeal which is one against an order of the Master granting to the decree-holder leave to bid at the auction sale of the mortgaged property directed by the decree. On the date of the order there was a sum of over Rs. 16,000 due to the respondent who is the decree-holder. The order of the Master permitted him to bid for the property for the market value which is stated in the proclamation to be Rs. 13,000 an amount much less than the amount due to the decree-holder under the decree.

The right of appeal from an order or decision of the Master is granted or recognised in Order XIII, Rule 19 of the Original Side Rules. It says:

"Any person affected by any order or decision of the Master or the First Assistant Registrar, Original Side, in respect of all matters judicially dealt with in the exercise of the powers delegated to him by the Honourable the Chief Justice from time to time under O. 40, R. 2 of these rules may appeal therefrom to a Judge."

The ground on which the preliminary objection is founded is that, in giving leave to bid, the Master was not exercising a judicial, but merely an administrative or ministerial function and this rule does not permit an appeal from such an order. The question whether, in giving or refusing leave to bid, the Court exercises a judicial or an administrative functon was considered by a Bench of this Court in *Ulaganatha* v. *Molaveedu*

*C.S. No. 148 of 1936. 15th October, 1941.
Appln. No. 2177 of 1941.

Embaru v. Vedavalli Ammal.

Alagappa,[1] and it was held that an order giving or refusing leave to bid is a ministerial order and not a judicial one. That decision was given under Order XXI, Rule 72 of the Civil Procedure Code, and it merely followed a ruling of the Privy Council in *Ko Tha Hnyin v. Ma Hnin, J*,[2] Although the present case arises not under the Civil Procedure Code, but under the Original Side Rules, it seems to me that I am bound to follow the rulings mentioned above, which determine the character of the order when the Court gives or refuses leave to bid.

Order XVIII, Rule 8 of the Original Side Rules relates to applications for leave to bid and it says that "an application for leave to bid at the sale may be made by Master's Summons in Chambers, supported by affidavit setting forth any facts showing that an advantageous sale cannot otherwise be had.........." This rule is general with regard to sales of property under orders of Court. Order XXIX relates to the procedure in regard to suits on mortgages and charges. Rule 6 of this order says:

> "A sale of mortgaged property shall be conducted in manner prescribed by O. 18 of these Rules. Provided that, if leave to bid is granted to the plaintiff or applicant, and, unless the Court otherwise orders, the sum allowed to be bid shall be not less than the whole amount then due for principal, interest and costs; and in the event of the property being sold in lots, not less than the market value of each lot in respect of which the bid is made."

The general rule is that leave to bid is not to be granted unless the decree-holder is prepared to bid for not less than the amount due to him for principal, interest and costs, and that that course should be followed unless the Court otherwise orders. In the present case the Court (which term includes a Master) has made an order departing from the ordinary practice, which it is of course entitled to do. The question for consideration is whether when the Court 'otherwise orders', the Court acts judicially or in an administrative capacity. I quite agree that, before the Court, 'otherwise orders', it has to take into account the facts and circumstances of the case. But I am not satisfied that, when a Court in granting or refusing leave to bid is acting in a ministerial capacity the mere fact that certain considerations have to be taken into account before making its order, is a good reason for holding that the order for that reason becomes a judicial one. Even when a Court acts in a ministerial capacity it does not mean that the Court is entitled to act arbitrarily. The question as to the nature of an order is not to be determined by the nature of the considerations which weigh with the Court or the fact that the Court is called upon to exercise a discretion before it makes the order.

I am of opinion that the Master in the present case acted in a ministerial capacity and his order therefore is not liable to be appealed against. The preliminary objection succeeds and the appeal is dismissed with costs.

B. V. V. —— *Appeal dismissed.*

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1. (1929) 122 I.C. 161 (M.).
2. (1911) L.R. 38 I.A. 126: I.L.R. 38 Cal. 717 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

The Province of Madras represented by the Collector of Trichinopoly ... *Appellant** (*Defendant*)

v.

The Lady of Dolours Convent, Trichinopoly, represented by the Mother Superior and others .. *Respondents.*

Province of Madras *v.* Lady of Dolours Convent, Trichinopoly.

Madras Irrigation Cess Act (VII of 1865)—Water cess—Whether 'land tax'.

Water cess levied under the Madras Irrigation Cess Act, 1865, is in the nature of land tax. Accordingly where under a grant or treaty no land tax is leviable in respect of certain lands the Government has no power to levy water cess, whether it be in rspect of the first or the second crop.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in A.S. Nos. 65 and 68 of 1938 and A.S. Nos. 66 and 69 of 1938, preferred against the decree of the Court of the District Munsif of Trichinopoly in O.S. Nos. 643 and 646 of 1936 respectively.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

K. G. Srinivasan for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—These two appeals arise out of different suits but they raise the same question. The suits were filed by the Mother Superior of the Lady of Dolours Convent, Cantonment, Trichinopoly, to recover from the Government of Madras moneys which the Convent had been compelled to pay by way of water cess and road cess as the owner of certain lands in the Trichinopoly District. The suit out of which S.A. No. 1064 of 1939 arises was filed by the Mother Superior for the recovery of amounts collected in respect of the faslis which correspond to the years 1931-32, 1932-33 and 1933-34. The suit out of which S.A. No. 1047 of 1939, arises was filed by her for the recovery of similar exactions in respect of the fasli corresponding to the year 1934-35. The appeals are concerned merely with the question of the liability for water cess.

The plaintiff's case is that under an arrangement with the Government the lands in suit are held free from land tax and that a cess which is levied in respect of water used for irrigating land is a land tax. The lands originally formed part of the private properties of the Nabob of the Carnatic. In 1801, under the terms of a treaty entered into by the Nabob with the East India Company, his sovereign rights terminated but he was allowed to retain his private properties free from taxation. The Nabob of those days died soon after the treaty had been signed and was succeeded by another Nabob, who, according to the judgment of the Subordinate Judge now under appeal, died on the

*S.A. Nos. 1046 and 1047 of 1939. 3rd March, 1942.

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7th October, 1855. He and his predecessor had incurred large debts and in 1858 the Legislative Council of India passed an Act (Act XXX of 1858) for the administration of these private lands in order that the debts might be discharged and suitable provision made for the children and the relations of the Nabob as the result of proper management. The Act vested the private properties of the Nabob in a receiver, who was given power to sell. The receiver having decided to sell the properties in suit, he applied to the Government of Madras for a certificate that they were permanently exempt from all demand on account of quit rent, assessment, or other land tax. A certificate was granted on the 1st March, 1866, and is one of the Exhibits in the present suits. It reads as follows:

"Whereas the receiver of the Carnatic property under Act XXX of 1858 has produced good *prima facie* evidence of the title of His Highness the late Nabob of the Carnatic to the premises hereunder specified, now held free of quit rent or other land-tax and not justly liable to any such payment according to the custom of the district or the regulations of the Government, and has applied for a certificate, I hereby declare accordingly under the authority of the Governor in Council of Madras, that the said land is permanently exempt from all demand on account of quit rent, assessment or other land tax."

It is common ground that the Government of Madras has never imposed water cess in respect of water supplied for the cultivation of the first crop raised on the lands in suit. The water used for irrigation is supplied from the Uyyakondan channel, which is connected with the river Cauveri. The Court has been told that this channel has been in existence from time immemorial. The exactions of which the plaintiff complains were made because the tenants cultivating the lands had taken water for the purpose of raising a second crop. From the Inam register of 1866, it is to be gathered that the area held by the plaintiff's predecessor in title measured altogether 59·50 acres, of which 50·59 acres were single crop wet lands and 8·91 acres double crop wet lands. The receiver appointed under Act XXX of 1858, sold these lands to the Rev. A. De Rochely, who was then the Superior of the Catholic Mission at Trichinopoly. On the 26th June, 1867, the Rev. A. De Rochely wrote to the Collector claiming that 45 cawnies (about 60 acres) were held free of "all kinds of taxation by virtue of the Government certificate", but that 6 ¾ cawnies (roughly 9 acres) had been by mistake classed among the Government lands "that pay tax for irrigtion, roads, etc." Accordingly he asked the Collector to issue an order that these 6¾ cawnies were also held free of all taxes. On the 6th July, 1867, the Collector passed an order in which he has declared that the lands were liable only to village cess and road cess. On the 7th September, 1930, the Collector directed that the lands should be registered as being held free of assessment or quit rent.

The present suits were tried by the District Munsif of Trichinopoly, who held that the plaintiff was entitled to the refund in respect of the 8·91 acres, but not in respect of the remaining lands. The basis of his decision that the 8·91 acres were entitled to water for a second crop was apparently the fact that this area had been classified in the Inam register as double

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crop lands and therefore the plaintiff was entitled to complete exemption from the water cess to this extent. Both sides appealed to the Subordinate Judge of Trichinopoly, who held that the Government was not entitled to levy water cess at all.

The Madras Irrigation Cess Act, 1865, came into force some six months before the Governor of Madras in Council gave to the receiver appointed under Act XXX of 1858, the certificate which has been quoted. S. 1 of the Madras Irrigation Cess Act confers power on the Government to levy water cess in addition to land assessment, but the first proviso to this section says that where a zamindar or inamdar or any other description of land holder not holding under ryotwari settlement is by virtue of engagements with the Crown entitled to irrigation free of separate charge, no cess under the Act, shall be imposed for water supplied "to the extent of this right and no more." The plaintiff says that this provision read in conjunction with the exemption certificate makes it clear that water cess is not chargeable even when water is taken for a second crop.

A charge for water supplied for the purpose of cultivation is a charge on the land. The Madras Irrigation Cess Act levies the cess on the land. In delivering the judgment of the Privy Council in *Kandakuri Bala Surya Prasad Row* v. *The Secretary of State for India in Council*[1] in which the appellants sought to recover from the Secretary of State for India sums paid under protest in respect of water cess levied under the Act of 1865, Lord Parker of Waddington said that the cess under the Act is leviable on land which is irrigated and therefore is in the nature of a land tax. In view of this judgment there can be no doubt that the exemption certificate applies to water cess, it being a form of land tax.

By virtue of the treaty with the Nabob of the Carnatic in 1801, the East India Company had no right to levy a land tax and therefore no right to levy a water cess. The Uyyakondan channel was then in existence and if the Nabob took water from it he could not, by reason of the treaty, be taxed in this respect. The plaintiff stands in his shoes. Moreover, the exemption certificate granted to the receiver says that these lands are permanently exempt from all demand on account of land tax. These words are free from ambiguity and even if the plaintiff's case were merely based on the certificate obtained by her predecessor in title there would be much to be said for her contention, but reading that certificate in the light thrown by preceding events it is clear that the plaintiff's case is well founded.

The learned Government Pleader has argued that the plaintiff cannot claim exemption in respect of the 8·91 acres which were shown as double crop lands in the Inam register, because the area held by the plaintiff is admittedly only 40·25 acres and in the settlement of 1898, the register shows an area of 30·80 acres, all of which are single crop lands. On this footing he argues that the 8·91 acres must have been disposed of. This may

1. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 (P.C.).

very well be so, but it does not affect the plaintiff's case. She contends that the Government has no power to levy a water cess at all, and for the reasons given this contention must prevail.

Whether the Government can be compelled to supply the plaintiff or her tenants with water for the raising of a second crop is another matter, but as it is not necessary to decide it in this case it must be left open. All that the Court is here concerned with is whether the Government can levy water cess in respect of the lands in suit and the answer must be that it cannot, whether it be in respect of the first or the second crop.

The appeals fail and will be dismissed with costs, which will be paid within three months.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Titti Krishnamurthi .. *Petitioner** (*Petr.*)

v.

Sri Jagannadhapadhi Khadanga and another .. *Respondents* (*Counter-petitioners*).

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (2) proviso (b)—Court's jurisdiction to examine legality or illegality of assessment to profession tax.

It is not open to the Court dealing with a matter under Madras Act IV of 1938 to go into the question whether a person who has in fact been assessed to profession tax during the relevant period has been assessed legally or illegally.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the decree of the Court of the Special Deputy Collector of Chicacole Division, dated 16th June, 1940, and passed in M.A. No. 165 of 1938.

B. Jagannadha Das for Petitioner.

Kasturi Seshagiri Rao for Respondents.

The Court delivered the following

JUDGMENT.—The only question in this revision petition is whether the petitioner is excluded from the definition of agriculturist on the ground that he paid profession tax for two years preceding 1st October, 1937, so as to come within proviso (B) to S. 3 (2) of the Madras Act IV of 1938. The facts are clearly established. The petitioner was assessed to profession tax for four years from 1933 to 1937. Apparently he made a protest in 1937, but there was no appeal filed in respect of any tax for any of these four years. In 1938 when the arrears of tax were demanded he objected that he had no property within the limits of the panchayat board and did not carry on any trade within those limits. Thereupon the president took legal advice and on being advised that the tax was not properly payable, he requested the orders of the Inspector of Local Boards whether he should enforce the collection of the tax or write it off as irrecoverable. The Inspector advised the panchayat board that the demand was illegal, and that it should not be written off, but should be ex-

* C.R.P. No. 2151 of 1940. 23rd March, 1942.

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punged from the tax register. These proceedings were in March, 1939, and it is reasonable to assume that when this reference to the Inspector of Local Boards was made, everyone was aware that the importance of assessment to profession tax was in the light of Act IV of 1938 something more than the actual liability to tax. The learned Deputy Collector has held that the cancellation of the assessment by the President on the order of the Inspector of Local Boards was invalid and will not affect the assessment so far as proviso (B) is concerned. It seems to me that this view is correct. The rules in Schedule 4 to the Local Boards Act (XIV of 1920) give a right of appeal against the imposition of the tax and a right to the Panchayat to cancel or modify any order passed by the President reducing or remitting a tax; but in the absence of any appeal it is provided that the assessment or demand of any tax shall be final. No power is conferred either upon the President or upon the Panchayat to cancel an assessment which has once been made and has not been challenged in appeal within the time allowed. It is open to the Panchayat to write off a tax as irrecoverable and no doubt the Panchayat may as an administrative act, instead of writing off the tax, expunge the name of the person assessed from its registers. But this administrative act will not affect the legal position of the person taxed, in order to make a person who has been assessed into one who has not been assessed, and it is certainly not open to the Court dealing with a matter under Act IV of 1938 to go into the question whether a person who has in fact been assessed, has been assessed legally or illegally. In this view I dismiss this civil revision petition with costs.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL.

Pottentakath Kunholan .. *Appellant** (*1st Respdt.*)

v.

Krishnan and others .. *Respondents* (*Petrs.*).

Pottentakath Kunholan v. Krishnan.

Malabar Tenancy Act (*XIV of* 1930), *S.* 3, *sub-Cl.* (v)—*Transfer of Property Act* (*IV of* 1882), *S.* 58 (d)—*Usufructuary mortgage—Reservation of part of income towards interest and payment of balance towards rent—Whether consideration.*

A usufructuary mortgagee gets possession of the mortgaged property by virtue of his mortgage as security for the mortgage money. He has, however, to account for the income from the property, and the reservation of part of the income towards interest and the payment of the balance to the mortgagor are not consideration for the enjoyment of the land but are no more than items in the account between mortgagor and mortgagee.

Any surplus of the usufruct paid in the form of produce from the land is neither rent nor other consideration for being allowed to enjoy the land within the meaning of the S. 3, sub-S. (*v*) of the Malabar Tenancy Act and the definition of 'tenant' is not intended to cover a usufructuary mortgagee.

Venkateswara v. *Kesavashetti*, (1879) I.L.R. 2 Mad. 187 and *Vasudevan Nambudri* v. *Raman Nambudri*, (1940) 2 M.L.J. 712: 52 L.W. 639, relied on.

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*S.A. No. 720 of 1940. 6th March, 1942.

Pottentakath Kunholan *v.* Krishnan.

Appeal against the decree of the Court of the Subordinate Judge of Calicut in A.S. No. 112 of 1940 preferred against the order of the Court of the District Munsif of Parappanangadi in I.A. No. 186 of 1938 in O.S. No. 82 of 1938 (O.S. No. 279 of 1935, District Munsif's Court, Tirur).

P. Govinda Menon for Appellant.

K. P. Ramakrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The question in this second appeal is whether a usufructuary mortgagee from a sub-kanomdar is entitled to the benefits of S. 33 of the Malabar Tenancy Act. The appellant was the assignee of certain properties in respect of which the jenm right had been sold in Court auction, and on the same day on which the jenm right was assigned to the appellant the kanomdar also assigned his rights in the property to him. The appellant then brought a suit O.S. No. 82 of 1938, in the Court of the District Munsif of Parappanangadi, to redeem and recover possession of the suit properties. This suit was contested by the sub-kanomdars from the 16th defendant, defendants 1 to 8; and the present respondents, who were the 9th to 11th defendants in the suit and were in possession of the suit properties as usufructuary mortgagees from defendants 1 to 8, filed a petition, I.A. No. 186 of 1938, under S. 33 of the Malabar Tenancy Act, claiming that they were entitled to purchase the house and site situated on the property as a separate kudiyiruppu. The trial Court decreed the suit but allowed the applications that the house and site should be treated as a separable kudiyiruppu, and the lower appellate Court dismissed the appeal of the plaintiff against the decision on the question which arose under S. 33 of the Tenancy Act.

S. 33 of the Malabar Tenancy Act provides that:

> "In any suit for eviction relating wholly or in part to a kudiyiruppu, which has been in the continuous occupation of a tenant or the members of his family for ten years on the date of the institution of the said suit, such tenant shall be entitled to offer to purchase the rights in the kudiyiruppu, of the landlord who seeks to evict him, at the market price on the said date."

The argument advanced in the lower Court against the respondents' claim seems to have been chiefly that 'landlord' in S. 33 means immediate landlord and that consequently persons holding from a sub-kanomdar were not entitled to purchase the jenmi's rights in kudiyiruppu. This argument was not accepted by either the trial or the first appellate Court on the ground that in other sections of the Act, 16 to 18, where it was intended that the tenant should be given rights to relief against his immediate landlord only, the term 'immediate landlord' is used. It is now conceded that the decision of the lower Courts on this point was right; and the argument put forward is that the respondents are not tenants within the meaning of the Malabar Tenancy Act. It is also conceded that the respondents are usufructuary mortgagees within the meaning of S. 58 (*d*) of the Transfer of Property Act, and that they had been in continuous occupation of the property for ten years on the date of suit.

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"Tenant" is defined in S. 3 (*v*) of the Malabar Tenancy Act as follows:

> "Tenant means any person who has paid or has agreed to pay rent, or other consideration, for his being allowed by another, to enjoy the land of the latter, and includes an intermediary, a kanamdar, a kuzhikanamdar, and a verumpattamdar of any description."

The appellant by the terms of his mortgage deed after paying himself the interest on the money advanced undertook to deliver annually to the mortgagor 100 cocoanut leaves and one bunch of plantains. It has been held that the surplus of the usufruct paid in this way by a usufructuary mortgagee to the mortgagor is not 'rent'. *Vasudevan Nambudri* v. *Raman Nambudri*.[1] That, however, does not conclude the matter for, by definition, a person may be a tenant within the meaning of the Malabar Tenancy Act who has paid not 'rent' but 'other consideration'. The question, therefore, is whether the respondent paid the consideration, namely, the leaves and bunch of plantains, or reserved the rest of the usufruct for appropriation towards interest 'for being allowed' by their mortgagor, the predecessor-in-title of defendants 1 to 8, to enjoy his land. In deciding in *Vasudevan Nambudri* v. *Raman Nambudri*,[1] that the surplus paid by a possessory mortgagee to his mortgagor after appropriating part of the usufruct to the interest due on the mortgage money was not rent, Patanjali Sastri, J., who delivered the judgment of the Court referred to and followed the decision in *Venkateswara* v. *Kesavashetti*.[2] That was a case of the possessory mortgage of certain premises. 'Rent' for the premises was fixed at Rs. 16-12-0. Out of this Rs. 14 was appropriated towards the payment of the interest on the principal and Rs. 2-12-0 was to be paid 'as rent' to the mortgagor. The premises were burned down. The rent ceased to be paid, and the mortgagor sued for recovery of the site and the arrears of rent. In holding that the suit ought to be dismissed Innes, J., observed as quoted in *Vasudevan Nambudri* v. *Raman Nambudri*[1]:

> "The gist of the agreement was not a letting of the premises with a rent reserved, but a usufructuary mortgage of the premises with a certain small portion of the income of it made payable to plaintiff"

and he also observed:

> "The application of the income of the premises is properly an item in the account between the mortgagor and mortgagee which cannot at present be taken."

Muthuswami Aiyar, J., said:

> "I take the defendant to have really got into possession not as a tenant —not because he engaged to pay the plaintiff Rs. 2-12-0 a month for the use of the warehouse—but as a mortgagee, and because of the assignment of the usufruct in lieu of interest amounting to Rs. 14 per mensem".

It seems, therefore, that the surplus of the usufruct paid in the form of cocoanut leaves and plantains is neither rent nor consideration for being allowed to enjoy the land within the meaning of S. 3, sub-Cl. (*v*) of the Malabar Tenancy Act. The question remains whether the part of the usufruct reserved and appro-

1. (1940) 2 M.L.J. 712: 52 L.W. 639.
2. (1879) I.L.R. 2 Mad. 187.

Pottentakath Kunholan v. Krishnan.

priated towards the interest on the mortgage money can be regarded as consideration "for being allowed to enjoy the land". The observation of Muthuswami Aiyar, J., that the defendant in that case got into possession 'as a mortgagee, and because of the assignment of the usufruct in lieu of interest' perhaps indicates that the reservation of the usufruct would be consideration for the enjoyment of the land. Innes, J., however said that the application of the income from the premises was properly an item in the account between mortgagor and mortgagee, and that, it seems to me is the true view. A usufructuary mortgagee gets possession of the mortgaged property by virtue of his mortgage as security for the mortgage money. He has, however, to account for the income from the property, and the reservation of part of the income towards interest and the payment of the balance to the mortgagor are not consideration for the enjoyment of the land but are no more than items in the account between mortgagor and mortgagee.

S. 3 (*v*) of the Act states that the definition of tenant includes "an intermediary, a kanamdar, a kuzhikanamdar and a verumpattamdar of any description". The enumeration is, of course, not exhaustive, but apart from intermediaries, the specific inclusion of occupiers under well-known Malabar tenures which are defined in the Act itself while a 'usufructuary mortgagee' is neither defined nor included would seem to indicate that it was not the intention of the Legislature that the definition of 'tenant' should cover a usufructuary mortgagee or that a usufructuary mortgagee should be entitled to the benefits of the Act.

It is argued by learned counsel for the respondents that a usufructuary mortgagee is by definition a tenant for the purposes of the Malabar Compensation for Tenants' Improvements Act. I do not see that this helps the respondent. On the contrary, if the Legislature had intended that the Tenancy Act and the Tenants' Improvements Act should be applicable to the same categories of persons there seems no reason why the definition of tenant in the latter and earlier Act should not have been incorporated in the Tenancy Act. But that has not been done.

The appeal is therefore allowed. I see no indication that this point of law was raised in the lower Court. The appellant will pay his own costs of the appeal.

Leave to appeal is granted.

(This appeal having been set down for 'being mentioned' this day the Court delivered the following Judgment) :—

The only further order necessary is the direction that the appellant will be entitled to recover possession of the kudiyiruppu on payment into Court for payment to the respondents of the sum of Rs. 21-10-5 in addition to the amount already ordered in respect of the recovery of the other items. One month's time for deposit.

Appeal allowed—Leave granted.

K. C.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Ordinary Original Civil Jurisdiction.*]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Commissioner of Income-tax, Madras .. *Petitioner**

v.

Papammal .. *Respondent.*

F.B. — Commissioner of Income-tax Madras *v.* Papammal.

Indian Income-tax Act (XI of 1922), *Ss.* 4-A (a) (ii) *and* (iii) *and* 4-*B—Assessee residing in Burma for some periods before 1st April,* 1937—*Assessee maintaining dwelling house in India and staying there for sometime in* 1934, 1936 *and* 1937—*Assessee "ordinarily resident" in "British India" for purposes of assessment for the year* 1939-40.

The assessee who had property in British India including a dwelling house which she maintained at Srirangam where she had stayed for sometime in 1934, 1936 and 1937 and a business at Rangoon, in making a return for the year of assessment 1939-40 claimed the benefit of the proviso to S. 4 of the Income-tax Act and contended *inter alia* that she was not "ordinarily resident" in "British India" within the meaning of S. 4-B inasmuch as she had been in Burma for some periods prior to 1st April, 1937, and that in defining British India regard should be had only to what was British India in the year of account (by which time Burma had ceased to be part of British India).

Held, that having regard to the words preceding the definition of "British India" in S. 311 of the Government of India Act, 1935, S. 4-B of the Income-tax Act must be read in the light of the definition of "British India" in S. 3 (7) of the General Clauses Act as amended by the Government of India (Adaptation of Indian Laws) Order, 1937.

Held, further, that so read the assessee should be deemed to have been "ordinarily resident" in British India by reason of her having been in Rangoon during the relevant periods referred to in S. 4-B (*a*) of the Income-tax Act.

The Commissioner of Income-tax v. *Valliammai Achi,* I.L.R. (1939) Mad. 388, followed.

Case stated under S. 66 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras.

K. V. Sesha Aiyangar for Petitioner.

M. Subbaraya Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The assessee is the widow of the late Raja Ramanatha Reddiar, and is the administratrix of his estate. Chidambaram Reddiar, the father of Raja Ramanatha Reddiar, founded a business in Rangoon and this was carried on by his son after his death. The late Raja died in Rangoon in 1932, possessed of large assets some of which were in Burma and some in the Madras Presidency. The assets in the Madras Presidency included immovable property in the Trichinopoly District. Raja Ramanatha Reddiar had previously married one Parvathi Ammal, who in 1915, purchased a house in Srirangam. This house has been regarded as ancestral property and is reserved for the occupation of the assessee during her occasional visits to

*O.P. No. 215 of 1941. 5th December, 1941.

the Presidency. She stayed there in 1934, 1936 and again 1937, each time making a stay of more than three months. For the year of assessment 1939-40 the assessee made a return of the income of the estate to the Income-tax Officer, Salem, and in this she showed an income of Rs. 65,276 from money-lending in British India and Rs. 14,950 as remittance of profits brought into British India from Rangoon. She contended that she was not resident in British India, but this contention the Income-tax Officer overruled. He held that she was resident in British India within the meaning of Ss. 4-A (*a*) (*ii*) and 4-A (*a*) (*iii*) of the Indian Income-tax Act. S. 4-A (*a*) (*ii*) was held to apply as she had maintained a dwelling house in Srirangam throughout the year previous to the year of assessment. It was held that S. 4-A (*a*) (*iii*) applied because she had been in Rangoon for a period amounting to more than 365 days in the four years preceding the year of account. Burma was part of British India until the 1st April, 1937, when it became separate by reason of the provisions of the Government of India Act, 1935. The Income-tax Officer further held that the assessee was "ordinarily resident" in British India within the meaning of S. 4-B as she had been in Rangoon in nine out of the ten years preceding the year of account and as she had also been in Rangoon for a period amounting to more than two years in the seven years preceding that year. The result was that the Income-tax Officer assessed the assessee for the year 1939-40 on a total income of Rs. 1,15,180 of which Rs. 70,458 was regarded as income earned in British India and Rs. 44,722 as income earned in Burma. The Appellate Assistant Commissioner confirmed the order of the Income-tax Officer, and at the request of the assessee the Commissioner has referred to this Court under the provisions of S. 66 (2) the following questions:—

"(*i*) Whether for the purpose of S. 4-A (*a*) of the Indian Income-tax Act being in Burma during any periods prior to 1st April, 1937, when Burma was part of British India amounts to being in British India during those periods.

(*ii*) If the answer to the first question be in the affirmative whether on the facts of this case the petitioner can be found to be resident and ordinarily resident in British India for the year of assessment 1939-40?"

Under the Indian Income-tax Act a person is assessed for a particular year on the income received by him in the previous year. S. 4 states what the total income of the year of account shall be deemed to include. If a person is resident in British India during the year of account all income, profits and gains which accrue or are deemed to arise in British India during that period are taxable and similarly all income accruing or arising outside British India, but there is a proviso to the effect that in the case of a person not "ordinarily resident" in British India income, profits and gains which accrue or arise to him without British India shall not be included, unless they are derived from a business controlled in or a profession or vocation set up in India or unless they are brought into or received in British India by him during the year of account. The assessee here says that she is not ordinarily resident in British India and is entitled to

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the benefit of the proviso in respect of the Burma income until it is brought into British India.

Residence in British India is defined in S. 4-A. Clause (*a*) (*ii*) states that for the purposes of the Act an individual is resident in British India in any year if he maintains or has maintained for him a dwelling place in British India for a period or periods amounting in all to 182 days or more in that year, and is in British India for any time in that year. Clause (*a*) (*iii*) says that an individual is resident in British India in any year if he, having within the four preceding years been in British India for 365 days or more, is in British India during the year of account otherwise than on an occasional or casual visit. The learned counsel for the assessee has conceded that by reason of the maintenance of the family house in Srirangam he cannot dispute the contention of the Income-tax authorities that the assessee was resident in British India during the year of account. But in order to bring her within the Act in respect of the Burma income it must be shown that she was "ordinarily resident" in British India in that year.

S. 4-B (*a*) reads as follows:—

"An individual is not 'ordinarily resident' in British India in any year if he has not been resident in British India in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in British India for a period of, or for periods amounting in all to, more than two years."

On behalf of the assessee it is said that in defining the term "British India" regard can only be had to what was British India in the year of account, and that on the first day of that year Burma ceased to be part of British India. It is admitted that if the term must be read as applying to British India as it stood before the 1st April, 1937, when considering residence during the ten or the seven years referred to in S. 4-B (*a*) the assessee is out of Court, but reliance is placed on S. 311 of the Government of India Act, 1935, which defines "British India" as meaning all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces. If this were the definition to be applied the assessee would be on sure ground, but the argument overlooks the words which precede the definition given in the section. The section opens thus:—

"In this Act, and unless the context otherwise requires, in any other Act the following expressions have the meanings hereby respectively assigned to them, that is to say—"

This statement leaves it open to the Court to examine the Income-tax Act and find out what is meant by the term "British India" in S. 4-B of the Income-tax Act, and in these circumstances regard must be had to what is said in S. 3 of the General Clauses Act. S. 3 (7) of that Act says:—

"In this Act and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context, 'British India' shall mean, as respects the period before the commencement of Part III of the Government of India Act, 1935, all territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or Officer subordinate to the Governor-General of

India, and as respects any period after that date means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar''.

This definition was inserted in the General Clauses Act, by the Government of India (Adaptation of Indian Laws) Order, 1937, which was promulgated under the provisions of S. 293 of the Government of India Act, 1935. Can there be any doubt that this definition is the guide to what is meant by "British India" in S. 4-B of the Income-tax Act? In our opinion there can be no doubt.

The learned counsel for the assessee has pointed to S. 293 of the Government of India Act and says that this indicates that the Adaptation Order cannot affect any Act which came into force after the promulgation of the Order. S. 293 so far as is relevant reads as follows:—

"His Majesty may by Order in Council to be made at any time after the passing of this Act provide that, as from such date as may be specified in the Order, any law in force in British India or in any part of British India shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of this Act and, in particular, into accord with the provisions thereof which reconstitute under different names Governments and authorities in India and prescribe the distribution of legislative and executive powers between the Federation and the Provinces''.

The important words here are "His Majesty may by Order in Council to be made at any time after the passing of this Act", and by reason of the power conferred by this section His Majesty has by Order in Council amended the General Clauses Act which applies to the Income-tax Act. If S. 4-B of the Income-tax Act is to be read in the light of the definition of "British India" in the General Clauses Act, as we consider it must be, there can be no doubt that the Income-tax authorities have formed the correct opinion of the law.

What we have said is sufficient to dispose of the reference, but there is a decision of this Court which supports in full the opinion which we have expressed. The case is *The Commissioner of Income-tax* v. *Valliammai Achi.*[1] There the assessee, who resided in British India, owned a saw mill in Burma. In the year of account, 1936-37, the saw mill business resulted in a loss and the assessee claimed to be entitled to deduct from her income assessable in the following year what she had lost in Burma during the year of account. Burma became separated from India on the first day of the year of assessment. It was held that she was entitled to deduct the loss suffered in Burma from her other profits. In that case the Commissioner of Income-tax referred this question:—

"Whether the decision of the Assistant Commissioner that the loss of Rs. 8,663 incurred by the petitioner in Burma in the year of account 1936-37 is not allowable as a deduction in the year of assessment 1937-38 is correct in law?"

1. (1939) 1 M.L.J. 31: I.L.R. (1939) M. 388 (F.B.).

F.B.

Commissioner of Income-tax Madras *v.* Papammal.

The Commissioner of Income-tax contended that as the combined effect of S. 3 and of sub-S. (1) of S. 4 was to render the tax for the year 1937-38 leviable in respect of the income, profits and gains which in the previous year accrued, arose or were received in British India and as Burma was no longer a part of British India the loss suffered in Burma was not deductible, in other words regard could only be had to what was British India in the year of assessment. The Court refused to accept this contention and said that as the tax was charged on the income of the previous year regard must be had to what was British India in the year of account. This decision was followed by the Bombay High Court in In re *Rawji Dhanji & Co.*[1]

The question referred in this case will be answered in the manner indicated, and as the assessee has failed she must pay the Commissioner's costs, Rs. 250.

K.C. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

The Province of Madras represented by the Collector of Madura .. *Appellant** (*Respondent*)

v.

Rao Bahadur O. N. Ramaswami Aiyar, Dewan and authorised agent on behalf of Kannivadi Zamindar .. *Respondent* (*Petitioner*).

Province of Madras *v.* Kannivadi Zamindar.

Madras Estates Land Act (I of 1908), S. 20-A—Application under—Decision of District Judge in appeal—Second appeal—Maintainability—Appellate decision whether a decree—Civil Procedure Code (V of 1908), S. 100.

Under the Madras Estates Land Act, the right of Second Appeal in the case of applications is limited under S. 190 of the Act, to orders passed on appeal by a District Collector under several specified sections of which S. 20-A is not one.

The decision of the District Judge in an appeal from the decision of the Collector on an application under S. 20-A of the Estates Land Act, is only an appellate order and not a decree within the meaning of S. 100 of the Code of Civil Procedure, and no second appeal lies to the High Court from the decision of the District Judge.

Appeal against the decree of the District Court of Madura in A.S. No. 183 of 1939, preferred against the order of the Collector of Madura, dated the 6th July, 1939, and made in R. Dis. No. G. 231 of 1937.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

V. Govindarajachari for Respondent.

The Court delivered the following

JUDGMENT.—This appeal has been brought against a decision of the District Judge of Madura in A.S. No. 183 of 1939, against a decision of the Collector of Madura under S. 20-A of the Madras Estates Land Act. It is sufficient to state for the

1. (1940) 8 I.T.R. 1.

* S.A. No. 963 of 1940. 6th March, 1942.

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purpose of this appeal that an application was filed under S. 20-A of the Madras Estates Land Act, by the Zamindar of Kannivadi in respect of four plots of land which he sought to have converted into ryoti land on the ground that they were 'old road' which was no longer required for public purposes. The collector threw the burden of proof on the Zamindar to show that the reversionary right did not vest in the Government as the land appeared to have been *lakhiraj* land. On appeal the learned District Judge held that the burden of proof had been wrongly cast on the Zamindar and on the evidence available he came to the conclusion that the reversionary right vested in the landholder. The order of the Collector was set aside and the four plots were ordered to be registered as ryoti land. Against this decision this second appeal has been brought.

A preliminary objection has been raised by Mr. Govindarajachari on behalf of the respondent that no second appeal lies. This objection is well founded and must be upheld. He contends that proceedings under S. 20-A of the Madras Estates Land Act, take the form of an application by the landholder, a ryot or any other person interested and the right of appeal regarding suits or applications is provided by S. 189 of the Act. This section refers to Parts A and B of the Schedule which deal separately with the right of appeal in suits and applications. Proceedings under S. 20-A of the Act, are referred to as serial No. 5 in Part B and a right of appeal to the District Court is provided against an order directing the conversion of the land into Government ryotwari or landholder's ryoti land. So far as the Madras Estates Land Act is concerned, the right of second appeal in the case of applications is limited under S. 190 of the Act, to orders passed on appeal by a District Collector under several specified sections of which S. 20-A is not one.

It is conceded that second appeals lie in the case of suits because these result in decrees and the first appellate proceedings before the District Court take the form of decrees also within the meaning of S. 100 of the Code of Civil Procedure. Mr. Govindarajachari relies on S. 104 read with Order XLIII, Rule 1 of the Code of Civil Procedure and he argues that since the initial proceedings take the form of an application, the order of the Collector thereon is an order and not a decree and the appellate order of the District Court is also an appellate order and not a decree. The distinctions between suits and applications and between decrees and orders are clearly recognised in the Code of Civil Procedure and I am unable to see how the learned Government Pleader can contend that an appeal against proceedings under S. 20-A of the Madras Estates Land Act, results in a decree and not merely in an appellate order. He has cited the case of *Kamaraju* v. *The Secretary of State for India*,[1] but that case does not afford much help in deciding this question. That case related to the question whether an order by a Forest Officer under S. 10 of the Madras Forest Act, was subject to second appeal, while in the present case we are concerned with the right of

1. (1888) I.L.R. 11 Mad. 309 (F.B.).

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appeal in proceedings under an entirely different statute. The learned Government Pleader has contended that the order of the District Court conclusively determines the rights of the parties and is therefore a decree within the meaning of the definition contained in S. 2 of the Code of Civil Procedure. But this argument overlooks the reference in the definition to a suit. The distinction between suits and applications is carefully preserved both in the Code of Civil Procedure and also in the Madras Estates Land Act. This distinction was discussed at considerable length in the Full Bench decision in *Rajagopala Chettiar* v. *The Hindu Religious Endowments Board, Madras.*[1] In my opinion the decision of the District Judge, although styled as a decree, was only an appellate order and was not a decree within the meaning of S. 100 of the Code of Civil Procedure. Consequently no second appeal lies and it is ordered to be dismissed with costs.

Leave to appeal is refused.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN AND MR. JUSTICE SOMAYYA.

Sundaramurthi Nainar .. APPELLANT*
(*1st Deft.*)

v.

Chotti Bibi *alias* Bacha Bibi and others .. *Respondents.*
(*Plff. and Defts.* 4 *to* 8 *and* 10 *to* 22).

Sundara murthi Nainar v. Chotti Bibi.

Mahomedan Law—Religious endowments—Land belonging to mosque—Lease for more than three years—Validity—Presumption of lawful origin—Whether can be invoked—Retrospective validation by Court—When permissible—Suit to avoid lease—Limitation.

The powers of a mutawalli to grant leases are restricted under the Mahomedan Law. A grant of land belonging to a mosque on lease for more than three years without the sanction of the Qazi or Judge is not valid. And where there is no recorded evidence of any application having been made to a Judge of the High Court, a District Judge or Subordinate Judge, who are recognised to have the powers of a Qazi, it will be impossible to raise a presumption of legal origin for the lease.

Mahammad Mazaffar-Al-Musavi v. *Jabeda Khatun,* (1930) 58 M.L.J. 641: L.R. 57 I.A. 125: I.L.R. 57 Cal. 1293 (P.C.) considered.

Before the Court is called upon to exercise an extraordinary jurisdiction for validating such a lease retrospectively the Court must be satisfied as to the absolute necessity of the lease and of the undoubted benefit which is conferred on the endowment by the transaction.

Nimai Chand Addya v. *Golam Hossein,* (1909) I. L. R. 37 Cal. 179 considered.

Leases granted by the mutawallis in respect of land belonging to a mosque are not void *ab initio* but only voidable. Consequently the lessee cannot be deemed to remain in adverse possession of the leased land after expiration of the lease. And a succeeding mutawalli who has not affirmed the lease can institute a suit for its avoidance within twelve years from the date of the death of the previous mutawalli.

Baijnath v. *Muhammad Ismail,* (1922) I.L.R. 44 All. 677 and *Bibi Jabeda Khatun* v. *Syed Mahomed Mozaffar Ali Hussain,* (1925) 30 C.W.N. 807, referred to.

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1. (1933) 66 M.L.J. 43: I.L.R. 57 Mad. 271 (F.B.).

*Appeal No. 126 of 1940. 10th April, 1942.

Sundaramurthi Nainar v. Chotti Bibi.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore, dated 30th March, 1940, and passed in O.S. No. 2 of 1940.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Appellant.

K. Bhashyam Aiyangar and *K. Desikachari* for Respondents.

The judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.:—This appeal arises out of a suit brought for the recovery of possession of a tope of which a lease was granted to the first defendant's grandfather on the 22nd January, 1891 (Ex. I) for a period of 83 years by two brothers Quadir Khan and Sikhandar Khan as mutavallis of a mosque and a graveyard situate in Sirukadambur (Ginjee taluk). It was described to be a bilmuktha lease and the lessee was to recover the money alleged to have been advanced by him to the mutavallis both before and at the time of the execution of the lease from out of the income of the land received by him during its continuance. Quadir Khan died in 1902, leaving several sons and daughters as his heirs. Sikhandar Khan died on the 8th April, 1925. He left only one daughter Chotti Bibi. She has brought the present suit impleading her own sons (defendants 17 and 18) and Quadir Khan's children (defendants 10 to 16 and 19 to 22) as defendants.

The plaintiff came to Court with the allegation that Ismail Shah Faquir was the hereditary mutavalli of the mosque and the graveyard and the Tauliat having devolved first on his sons and eventually on his grandsons Quadir Khan and Sikandar Khan, the latter exceeded their authority and granted a lease (Ex. I) for 83 years, that this could not be done under the Mohammadan Law without the sanction of the Qazi and was not binding on the plaintiff who is the successor in office of the abovenamed mutavallis. She therefore prayed for a decree for possession in her own favour but it was stated in paragraph 10 of the plaint that if the Court found the defendants 10 to 16 and 19 to 22 to be also entitled to the Tauliat, a decree may be passed in their favour as well. These allegations were met by various pleas but we are concerned in this appeal preferred on behalf of the lessee's grandson (defendant 1) with two only. Having regard to the facts that the validity of the lease was being impugned almost half a century after its execution when all its attesting witnesses and parties were dead, the first plea was that the lease might be presumed to have a legal origin and to have come into existence with the sanction of the Qazi; but if the Court was unable to raise such a presumption, it might anyhow grant the sanction retrospectively and validate the lease, as if granted by the mutavallis for a valid necessity and for valuable consideration. The second contention was that the suit was not within time and that the defendants had in any case prescribed for the limited rights created under the lease by adverse possession. It was not denied on behalf of the defendant that the office of mutavalli was in this case hereditary although on account of her being a female the plaintiff's right to Tauliat was disputed. The trial Court repelled these objections and passed a decree in favour of the

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plaintiff 'on behalf of herself and defendants 10 to 16 and 19 to 22'. The first defendant has preferred this appeal.

As to the first question it was not disputed by learned counsel for the appellant—as indeed it could not have been—that a grant of lease in respect of land would not have been lawful for more than three years without the sanction of the Qazi or the Judge. The powers of a mutavalli to grant leases are restricted under the Muhammadan Law. This accounts for the attempt made by Mr. Panchapagesa Sastri to invoke a presumption of legal origin. Reliance was placed in this connection on the decision of their Lordships in *Mahammad Mazaffar-Al-Musavi* v. *Jabeda Khatun*.[1] It must however be remembered that the office of a Qazi, who was under the Muhammadan Law entitled to sanction a lease for more than three years had long become obsolete in 1891, when the lease came into existence and even if a Judge of a High Court, a District Judge or a Subordinate Judge are recognized to have the powers of a Qazi (for which see *Shama Churn Roy* v. *Abdul Kabeer*,[2] *In the matter of Woozatunnessa Bibee*.[3] *In re Halima Khatun*,[4] *Atimannessa Bibi* v. *Abdul Sobhan*,[5] *Mahamed Ismail Ariff* v. *Ahmed Moolla Dawood*,[6] *Jamila Khatun* v. *Abdul Jalil Meah*,[7]) it does not seem possible to raise that presumption in the present case for the simple reason that the Civil Courts in British India were properly functioning when the lease came into existence and it is impossible to assume that no record of a sanction would have been kept, had the sanction for the grant of a lease been applied for and granted. No suggestion was made during the trial as to the presentation of any such application and no order or sanction by any competent authority is forthcoming. Nor is there any reference to it in the lease Ex. I. It is not easy to believe that if a sanction had been granted to the mutavallis by a District Judge, or any other officer competent to grant it, it would not have been mentioned in this document. The following observation of Viscount Sumner who delivered the judgment of the Board in the very case cited by learned counsel for the appellant *Mahammad Mazaffar-Al-Musavi* v. *Jabeda Khatun*,[8] is pertinent.

"At the same time it is not a presumption to be capriciously made, nor is it one which a certain class of possessor is entitled to *de jure*. In a case such as this, where it is necessary to indicate what particular kind of lawful title is being presumed, the Court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed, without doing violence to the probabilities of the case. The presumption is not an 'open sesame', with which to unlock in favour of a particular kind of claimant a closed door, to which neither the law nor the proved facts would in themselves have afforded any key. It is the completion of a right,

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1. (1930) 58 M.L.J. 641: L.R. 57 I.A. 125: I.L.R. 57 Cal. 1293 (P.C.).
2. (1898) 3 C.W.N. 158.
3. (1908) I.L.R. 36 Cal. 21.
4. (1910) I.L.R. 37 Cal. 870.
5. (1915) I.L.R. 43 Cal. 467.
6. (1916) I.L.R. 43 Cal. 1085.
7. (1918) 23 C.W.N. 138.
8. (1930) 58 M.L.J. 641: L.R. 57 I.A. 125: I.L.R. 57 Cal. 1293 at 1298 and 1299.

to which circumstances clearly point, where time has obliterated any record of the original commencement."

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It is impossible to assume, in the words of their Lordships that "time has obliterated any record of the original commencement" or "the completion of a right to which circumstances clearly point."

The next contention advanced under this head was that even if we were unable to raise a presumption in favour of the validity of the lease, we might grant the sanction now as to validate the lease retrospectively. Reliance was placed in that connection on the decision in *Nimai Chand Addya* v. *Golam Hossein.*[1] But before we can be called upon to exercise an extraordinary jurisdiction of that nature and to confirm a transaction retrospectively, we must be satisfied as to the 'absolute necessity' of the lease and of the 'undoubted benefit which has been conferred on the endowment by the transaction'. We are not satisfied that there was any necessity or benefit for which the lease Ex. I may have been essential. There is no evidence on the record why a sum of Rs. 2,138-4-0 was required during the ten years (1880 to 1890) as referred to in the lease when the annual income from the wakf property was in the vicinity of Rs. 500. Nor are we satisfied that the cash stated to have been paid at the time of execution was needed or spent on the wakf or that there was any necessity to execute a lease for more than three years. The trial Court has exhaustively dealt with this portion of the case in paragraphs 28 to 37 of its judgment and it seems to be unnecessary for us to tread the same ground once again except to say that we find ourselves in complete agreement with its conclusion that "the necessity recited in Ex. A and the necessity set up in the pleading do not bear scrutiny" and that this is not a fit case for inviting the sanction of the Court *ex post facto* (as representing the jurisdiction of the old Qazi) to validate the transaction".

This brings us to the next question which is one of limitation but really that of adverse possession, as the lease granted by the mutavallis for 83 years in favour of the first defendant's grandfather was, in the absence of a sanction by the Qazi before its grant or retrospectively by the Courts in the present suit, characterised by learned counsel for the appellant to be void after the lapse of three years and the possession of the lessee and his grandson (the first defendant) alleged to have been adverse under Article 144. He contended that Articles 134-A and 134-B which were added to the Statute book by the amendment to the Indian Limitation Act, would have no application as his title had become complete long before the Amending Act, I of 1929, came into force. The limitation, according to Mr. Panchapagesa Sastri, started on the 21st January, 1894, and his limited title to the lease became complete in 12 years thereafter. The underlying assumption in the whole of this argument is that the lease by the mutavallis in excess of three years was void to that extent. This is however incorrect. Leases granted by the mutavallis in respect of land for more than three years are not void *ab initio*.

1. (1909) I.L.R. 37 Cal. 179.

under the Mahomedan Law but only voidable. Mr. Ameer Ali has, in his Mahomedan Law (Vol. I, pages 478 and 479), cited the following passages from Durr-ul-Mukhtar, Radd-ul-Mukhtar and Hedaya:

Durr-ul-Mukhtar:

"So where the wakif has left indeterminate the period for which a wakf property may be leased, some (jurists) have said the Kyyum (mutavalli) has a general discretion as to the length of the term; whilst others have said the limit should be one year in all cases. And the fatwa is with regard to a year for (the lease of) houses and three years in respect of land unless expediency is opposed to this, and expediency varies according to time and locality."

Radd-ul-Mukhtar:

"When the repairs of the wakf premises cannot be effected without letting (some portion of) it, the matter must be placed before the Judge who can direct the grant of a lease long enough for that purpose."

Hedaya:

"Similarly, where the wakif has made a condition that the mutawalli shall not grant a long lease of the wakf, and people are not willing to take a short lease thereof, and it is to the advantage of the wakf that a long lease should be given, the mutawalli should prefer the matter before the kazi, who, if he deems necessary, can make an order to that effect, 'for the kazi is the guardian of the poor'. If the wakif has made a condition that the mutawalli shall not grant a long lease unless he deems that it would be productive of great benefit to the *cestui qui trust*, the mutawalli can give the lease in case of necessity, without reference to the kazi".

Baillie in his Digest of Muhammadan Law thus stated the rule at page 606 (2nd edition):

In the absence of any condition, the approved doctrine is that the lease of estates in land may be decreed to be lawful for three years, unless it be for the benefit of the wakf to annul them; and that with regard to leases of other property, they should be decreed to be unlawful when they exceed one year unless it be for the benefit of the wakf to sustain them. But this varies with the change of places and times. This is approved for the futwa."

The same view was taken by the Allahabad High Court in *Baijnath* v. *Muhammad Ismail*,[1]

"We may mention, moreover, that the provisions of the Muhammadan Law are not quite so rigid as the learned Judge seems to have understood. It is quite true that there was a rule laid down with regard to house property that a *mutawalli* should not in general be authorized to make a lease of such property for a period longer than one year, but there was this qualification attached to it, namely, that in all cases the Qazi might empower the *mutawalli* to grant leases for longer periods if he thought that such a grant was for the benefit of the trust estate."

If the lease had to be annulled by a Court and had to be regarded in force until then, the whole of the appellant's contention would fall to the ground. Leases which are usually the result of an act of management (or it may be that of mismanagement) have to be distinguished from sales. They have to be regarded as operative and binding on the trustee granting them unless they are declared to be otherwise. That is why a Division Bench of the Calcutta High Court composed of Greaves and Mukerji, JJ., observed in *Bibi Jabeda Khatun* v. *Syed Mahomed Mozafar Ali Hussain*,[2] as follows:

1. (1922) I.L.R. 44 All. 677.
2. (1925) 30 C.W.N. 807 at 810.

"These contentions are I think clearly untenable in view of the decision of the Judicial Committee in *Sri Vidya Varuthi Thirtha Swamigal* v. *Balusami Aiyar*.[1] That case deals with a Hindu *math* but the Board states that the principles there laid down apply equally to Mahomedan endowments and it is clear from that case that unless authorised by the *kazi* no *matwali* could create a leasehold interest to endure beyond his life, that the lessees acquired no title by adverse possession against the succeeding *matwali* and that if the succeeding *matwali* recognised the interest, the consent is only referable to a new tenancy created by him and that there is no adverse possession until his death or until a new *matwali* takes his place."

The same view was taken by a Division Bench of the Bombay High Court in *Hamidmiya Sarfuddin* v. *Nagindas Jivanji*.[2] There is no doubt that although an assignment or disposition of a math by a mahanth was held to be void from its very inception, a permanent lease by him of an item of property appertaining to the math, even if not for necessity, was held to be valid during the tenure of his office. This is so held by their Lordships of the Privy Council in *Ram Charan Das* v. *Nawangi Lal*.[3] The rules relating to maths were not only stated to be applicable to Muslim endowments by Mr. Ameer Ali alone in *Sri Vidya Varuthi Thirtha Swamigal* v. *Balusami Aiyar*,[1] but also by Viscount Sumner in *Mahammad Mazaffar-al-Musavi* v. *Jabeda Khatun*,[4] in the following words:

"There remains the question whether the decision of the Board in *Magniram Sitaram* v. *Kasturbhai Manibhai*,[5] can and ought to be distinguished on any ground. The only possible distinction is that it was a Hindu *math* with which the case was concerned. In principle, the cases are in themselves analogous. In the language of the judgment there is nothing to suggest that the subject then under discussion was regarded as being in any sense peculiar or special. As a matter of public right, their Lordships think it would be very undesirable to introduce purposeless distinctions between the law applicable in the case of one community and that applicable to another. They are therefore of opinion that the presumption rightly made by the High Court completed the defendants' answer to the plaintiff's claim to possession and they will humbly advise His Majesty that this appeal should be dismissed with costs."

If the transaction embodied in Ex. I was not void during the lifetime of the mutavallis who granted the lease and the latter of the two did not die, as stated before, until the 8th April, 1925, there would be no question of limitation or of the first defendant completing his title by adverse possession as the suit was instituted within 12 years of that date. On the death of the last mutavalli, the plaintiff who has been found to be a hereditary trustee could have either recognised the lease or refused to do so. There is no allegation that she agreed to recognise it. Had she done so, a new tenancy would have been held to come into existence with her consent. But since she did not do so the period of

1. (1921) 41 M.L.J. 346: L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).
2. (1932) I.L.R. 57 Bom. 709.
3. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.).
4. (1930) I.L.R. 57 Cal. 1293 at 1301.
5. (1921) 42 M.L.J. 501: L.R. 49 I.A. 54: I.L.R. 46 Bom. 481 (P.C.).

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limitation must only be taken to have started from the date of the last mutavalli's death.

For the above reasons, the appeal fails and is dismissed with costs.

B. V. V. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Tatikonda Subbarow .. *Appellant** (*Plaintiff*)

v.

Malladi Sitarama Lakshmi Narasimham and others .. *Respondents* (*Defendants*).

Subbarow v. Lakshmi Narasimham.

Usurious Loans Act (X of 1918), S. 3 (i) and (ii)—Payment of excessive interest—No subsequent agreement after closing of previous dealings—Application to reduce excessive interest stipulated in the original transaction after payment—Refund after appropriation warranted.

Cl. (*i*) of S. 3 of the Usurious Loans Act deals with cases where the parties have entered into no subsequent agreement in relation to the original transaction of loan, and confers upon the Court the power to reopen the transaction and reduce the excessive interest while Cl. (*ii*) provides for cases where the parties have subsequently made payments, appropriations, or adjustments towards the debt on the basis of the stipulated rate of interest and it empowers the Court in such cases to reopen such appropriations or adjustments with a view to give relief to the debtor by reducing excessive interest and even to direct a refund if any sum is found to be repayable to the debtor on the basis of such reduction. In this view there would be no redundancy or overlapping in Cls. (*i*) and (*ii*) and it is not necessary on any such ground to restrict the operation of Cl. (*ii*) to cases where the parties have entered into a subsequent agreement purporting to close previous dealings and to create a new obligation. Such a restriction of its scope seems to be unwarranted by the terms of the clause and would deprive it of much of its usefulness.

Ghanasyam Das Marwari v. *J. Nichols*, (1938) 42 C.W.N. 665, followed.

Audh Behari v. *Akshay Kumar*, (1940) 44 C.W.N. 253: A.I.R. 1940 Cal. 211, dissented from.

Appeal against the decree of the District Court of Kistna in A. S. No. 263 of 1940 preferred against the decree of the Court of the District Munsif of Masulipatam in O. S. No. 456 of 1939.

V. Rangachari for Appellant.

K. Krishnamurthi for Respondents.

The Court delivered the following

JUDGMENT.—The only question arising for determination in this second appeal relates to the construction of S. 3 of the Usurious Loans Act, 1918.

The facts are simple and not in dispute. The appellant brought the suit to enforce a mortgage for a sum of Rs. 800 carrying interest at Rs. 1-0-6 per cent. per mensem payable annually and in default of such payment, compound interest at Rs. 1-4-6 per cent. per mensem with yearly rests. On 26th July, 1937, there was a payment of Rs. 700 which was endorsed on the bond thus:

* S.A. No. 940 of 1941. 10th April, 1942.

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"Rs. 617 being interest in full due up to this date according to the terms of the bond and Rs. 83 towards the principal of the bond.......... The balance of the principal of the bond is Rs. 717."

The suit was for recovery of this balance of Rs. 717, no interest being claimed from 26th July, 1937, up to 14th October, 1939, when the suit was filed. It was argued in the Court below that the rate of interest provided in case of default was excessive and should be reduced and that the payment already made for interest at the rate stipulated should be re-appropriated on the basis of the reduced rate, under the provisions of the Usurious Loans Act. This argument was accepted by the Court below which reduced the rate to 12 3|8 per cent. per annum compound and adjusting, on this basis, the payment already made passed a decree for Rs. 663-15-0 as payable on the date of suit with proportionate costs.

The appellant did not question the finding of the lower Court that the default rate of interest was excessive but he urged that the Court had no power under the Usurious Loans Act in the circumstances of this case to re-open the appropriation of the payment made on 26th July, 1937 in terms of the endorsement referred to above. It was contended that S. 3 (1) (*ii*) which empowers the Court to re-open an appropriation already made applies only to cases where there has been an agreement between the parties purporting to close previous dealings and to create a new obligation, and as there was no such agreement in the present case it had no application here. Cl. (*ii*) of S. 3 (1) so far as it is material here runs as follows:

"the Court may exercise all or any of the following powers, namely, may .... (*ii*) notwithstanding any agreement purporting to close previous dealings and to create a new obligation, reopen any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof''.

The appellant sought to read the words "notwithstanding any agreement purporting to close previous dealings and to create a new obligation" as limiting the application of the provision only to cases where the parties have entered into an agreement purporting to close previous dealings and to create a new obligation. I am unable to accept this construction. The opening words are, in my opinion, inserted in order to make it clear that the Court can exercise the power although the parties have by agreement closed their previous dealings and created a new obligation, and the words cannot have the effect of confining the operation of the provision to cases where there has been such an agreement. It was suggested that unless the operation of the clause is so restricted, there would be a redundancy, as the words "reopen any account already taken between them and relieve the debtor of all liability in respect of any excessive interest" in Cl. (*ii*) were practically a repetition of Cl. (*i*). I see no force in this suggestion. The words quoted do not constitute a repetition of Cl. (*i*) and they envisage a different class of cases. Cl. (*i*) deals with cases where the parties have entered into no subsequent

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agreement in relation to the original transaction of loan, and confers upon the Court the power to reopen the transaction and reduce the excessive interest, while Cl. (*ii*) provides for cases where the parties have subsequently made payments, appropriations or adjustments towards the debt on the basis of the stipulated rate of interest, and it empowers the Court in such cases to reopen such appropriations or adjustments with a view to give relief to the debtor by reducing excessive interest and even to direct a refund if any sum is found to be repayable to the debtor on the basis of such reduction. In this view there would be no redundancy or overlapping in Cls. (*i*) and (*ii*) and it is not necessary on any such ground to restrict the operation of Cl. (*ii*) to cases where the parties have entered into a subsequent agreement purporting to close previous dealings and to create a new obligation. Such a restriction of its scope seems to be unwarranted by the terms of the clause and would deprive it of much of its usefulness.

My attention was drawn to the observations of Henderson, J., in *Audh Behari* v. *Akshay Kumar*,[1] where the learned Judge construed Cl. (*ii*) in the manner contended for on behalf of the appellant. The learned Judge observed that he was not prepared to follow an earlier decision of Edgley, J., in *Ghanasyam Das Marwari* v. *J. Nichols*[2] giving a more extended meaning to that clause. But he thought it unnecessary to refer the matter to a Division Bench as he was disposing of the case on another point. The observations relied on are thus *obiter* and with due respect I am unable to agree with them. The construction placed upon the section by Edgley, J., is, to my mind, the correct one and I have no hesitation in agreeing with it.

The appeal therefore fails and is dismissed with costs.

K.C. ——— *Leave refused.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Bellemkonda Kanakayya .. *Petitioner** (*2nd Accused*).

Bellemkonda Kanakayya, *In re.*

Madras Prevention of Adulteration Act (III of 1918), *Ss.* 5, 14 *and* 15—*Employee in shop selling ghee in master's absence—Sanitary Inspector taking sample—Employee not liable to be convicted of selling adulterated ghee—Failure to give notice under S.* 15—*Effect.*

A Sanitary Inspector entered a shop and in exercise of his powers under S. 14 of the Madras Prevention of Adulteration Act, demanded a sample of ghee and the second accused (petitioner), an employee in the shop who sold ghee in his master's absence, gave him the same which on analysis was found to be adulterated. On the questions whether the employee was guilty of the offence of selling adulterated goods and whether failure to give notice under S. 15 to an accused would vitiate his trial for an offence under S. 5,

Held, that the parting with the commodity on demand by the Sanitary Inspector in the exercise of his powers under S. 14 will not amount to a sale, though the position will be different if the Sanitary Inspector had

1. A.I.R. 1940 Cal. 211: 44 C.W.N. 253.
2. (1938) 42 C.W.N. 665.

* Crl. R. C. No. 163 of 1942. 1st July, 1942.
(Crl. R. P. No. 151 of 1942.)

Bellemkonda Kanakayya, *In re.*

merely tendered the money to the employee and he had voluntarily handed over the goods.

Held, further, that S. 15 is not in any way connected with the prosecution or the trial of a person for an offence under S. 5 so as to make it an indispensable preliminary to either and an offence under S. 5 will not cease to be so because of the omission on the part of the Sanitary Inspector to comply with S. 15 in giving a notice in writing that he had taken the ghee for the purpose of analysis.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Special First Class Magistrate, Guntur, dated 8th December, 1941 and passed in C.A. No. 7 of 1941, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Guntur, dated 16th October, 1941 and passed in C. C. No. 764 of 1941.

G. C. Venkatasubba Rao for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—The first accused in this case was the owner of a shop where he kept and offered for sale certain ghee which was found on analysis to be adulterated to the extent of 35 per cent. The second accused was working in that shop and his duty was to sell the ghee to customers. The Sanitary Inspector entered the shop, exercised his powers under S. 14 of the Madras Prevention of Adulteration Act, and demanded a sample from the second accused, who was then selling articles in his master's absence. When this sample was found to be adulterated ghee, both the accused were prosecuted. The Sub-Magistrate of Guntur, thought that both of them were guilty. In appeal, the Special First Class Magistrate came to the conclusion that because the first accused was absent and no notice was given to him as required by S. 15 that it was intended to have the sample analysed, that the trial and conviction of the first accused was vitiated. He however considered that the conviction of the second accused was right because he thought that he must be deemed to have offered this adulterated ghee for sale. The second accused has therefore preferred this revision petition against the affirmation by the appellate Judge of his conviction.

The Special First Class Magistrate seems to have acquitted the man who was guilty of an offence under the Act and to have convicted the man who was innocent. The first accused, in displaying this ghee in his shop, was offering it for sale; and S. 5 of the Act makes punishable the offering of ghee for sale. If the accused commits an offence under S. 5 by offering adulterated ghee for sale, it does not cease to become an offence because of an omission on the part of the Sanitary Inspector to comply with the requirements of S. 15 in giving a notice in writing that he had taken the ghee for the purpose of analysis. S. 15 seems to have been enacted for the protection of the vendor, so that he himself might, if he so wished, have the ghee analysed privately so that he might be satisfied that it was really adulterated in the manner and to the extent indicated by the public analyst. Accus-

Bellemkonda Kanakayya, *In re.*

ed persons not infrequently take advantage of the notice given to them under S. 15 and get the ghee analysed privately for the purpose of defending themselves against any charge that the authorities might prefer against them. If notice is not given, an accused person may have cause for complaint that he was not given a proper opportunity of defending himself. That argument would of course be available as much to an employee as to the owner. S. 15 does not suggest that it is in any way connected with the prosecution or the trial so as to make it an indispensable preliminary to either. If an accused contends that he would have had his part of the sample analysed but for the failure to give him notice in writing, the Court would have to consider the reasonableness of that plea.

The learned Public Prosecutor concedes that the petitioner was not offering ghee for sale. It is the owner, who displays articles in the shop and thereby invites the public to purchase them, who offers them for sale. The petitioner has no right to interfere with anything that his master had done, or to remove from the shop any articles that his master had placed there for sale. That does not of course mean that he could escape liability for doing any illegal act. He could not, for example, sell adulterated ghee, for that would be punishable under S. 5; but the offering for sale was presumably done by his master. As far as we know, the appellant did nothing to make the offer more attractive.

The charge against the petitioner was of offering ghee for sale; but it was argued that he would be guilty of selling the ghee. A sale is a voluntary transaction, even when it is preceded by an agreement to sell. When a person exhibits articles in his shop he is making a general offer to sell them, and any person who comes into the shop and offers the price accepts his offer; but the intending purchaser cannot use physical force or threats to compel the owner to part with the goods. If he does, the transaction is not a sale. If the Sanitary Inspector had not exercised his powers under S. 14, but had merely tendered the money and the petitioner had voluntarily handed over the goods, then there would have been a sale; and the fact that it was subsequently found that the goods were required not for consumption but for analysis, would make no difference to the nature of the transaction that had been entered into. In this case the petitioner would presumably not have parted with the goods voluntarily when he knew that they would be used for the purpose of bringing a case against him and his master. The petitioner was not therefore guilty of selling ghee. Lakshmana Rao, J., in a similar case held that the parting with a commodity when it is demanded by the Sanitary Inspector in the exercise of his powers under S. 14 of the Act did not amount to a sale.

The petitioner not having committed either the offence of selling ghee or of offering it for sale, he is entitled to be acquitted. The petition is therefore allowed and the conviction and sentence set aside. The fine, if paid, will be refunded.

K.C. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUPPUSWAMI AIYAR.

Madura Mills Company, Limited through its Managers, Messrs A. and F. Harvey, Madura .. *Appellant** (*Defendant*)

v.

The Madura Sri Meenakshi Sundareswaral, etc., Devasthanam, represented by its Executive Officer, Mr. R. S. Nayudu .. *Respondent.* (*Plaintiff*).

Madura Mills Co., Ltd. *v.* Madura Sri Meenakshi etc., Devasthanam.

Inam—Nature of grant—Grant of land for watching temple tower—Income small—Entry in statement made to Inam Commission—Inference as to grant of both melvaram and kudivaram.

The inam forming the subject-matter of suit was granted during the time of the Carnatic Rajas and the service to be performed was the guarding of the Sikaram of the Madura Temple. The inamdars were required to provide four men as watchers throughout the day and night. The grant however was not produced and the evidence with regard to it consisted of the statement made on behalf of the inamdars at the time the Inam Commission was sitting, the Inam Register and certain deeds of mortgage. In 1936 the Deputy Collector at the instance of the Devasthanam inquired into the question whether the lands were liable to resumption consequent on failure by inamdars to perform the service and the question was thereupon raised whether the inamdars were entitled to both the warams or only to the kudivaram interest. The statement presented to the Inam Commission had contained the following entry: "This land was given to our ancestors by the Rajas of Karnatic for watching the tower of the aforesaid temple and they were watching the tower and enjoying the said manyam land and now we are watching the tower and enjoying the inam land.'' It also appeared that the total income of the lands was small.

Held, that the words used in the statement presented to the Inam Commission implied a gift of the soil to the inamdars, and that on the evidence it should be declared that they were entitled to both the melvaram and the kudivaram rights in the lands granted.

Appeal against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 2 of 1938.

C. Krishnaswami Aiyar instructed by *King* and *Partridge* for Appellant.

K. Rajah Aiyar and *T. A. Ramaswami Reddi* for Respondent.

The Judgment of the Court was delivered by

Leach, C J.

The Chief Justice.—This is an appeal from a decree passed by the Subordinate Judge of Madura in a suit filed by the respondent under the provisions of S. 44 (*B*) of the Madras Religious Endowments Act, 1926, for a declaration that two parcels of land situate in the villages of Anuppanadi and Ponmeni were granted in respect of the Sikaram kaval service at the Sri Minakshi Sundareswaral temple, Madura, and that the lands were liable to resumption as the result of the failure of the grantees to perform the service. The appellants bought one of

*Appeal No. 248 of 1939. 2nd December, 1941.

Madura Mills Co., Ltd. v. Madura Sri Meenakshi etc., Devasthanam.

Leach, C.J

the parcels of land and the appeal is confined to the area which they purchased. It measures 5·9 acres.

Sub-S. (1) of S. 44 (*B*) provides that a sale of the whole or a portion of an inam granted for the performance of a charity or service connected with a math or temple and made, confirmed or recognized by the British Government, shall be null and void. Sub-S. (2), states that the Collector may resume the whole or any part of an inam of this nature if it has been sold, or the holder has failed to perform the services, or the math or temple has ceased to exist, or the charity or service in question has become impossible of performance. Any party aggrieved by an order of the Collector may appeal to the District Collector and if the District Collector's decision is against him he may file a suit in a Civil Court for determining whether the inam comprises both the melvaram and the kudivaram or only the melvaram.

In this case it is common ground that the inam was granted in the time of the Karnatic Rajas and the service to be performed was the guarding of the Sikaram of this temple. The inamdars were required to provide four men as watchers throughout the day and night. The grant has not been produced and the evidence with regard to it consists of the statement made on behalf of the inamdars at the time the Inam Commission was sitting, the inam register and certain deeds of mortgage.

In 1936 the Deputy Collector, at the instance of the Devasthanam, inquired into the question whether there had been a failure on the part of the inamdars to perform the service required of them and in the course of the inquiry he went into the question whether the inamdars were entitled to both the melvaram and the kudivaram. His conclusion was that the inam did not confer upon the grantees both the varams, but only the melvaram. On this basis he passed an order resuming the melvaram and regranted it to the Devasthanam. The trustee of the Devasthanam appealed to the Collector, who confirmed the Deputy Collector's order. The result was the institution of the present suit. The Subordinate Judge held that the inam comprised both the varams. Consequently he granted a declaration that the lands themselves constituted the inam attached to the Sikaram kaval service at this temple. The appellants say that the Collector came to the correct conclusion and as the purchasers of the land they are entitled to the kudivaram.

The statement presented to the Inam Commission contains in column 4 this entry:—

> "This land was given to our ancestors by the Rajas of Karnatic for watching the tower of the aforesaid temple and they were watching the tower of the said Meenakshi Amman's temple and enjoying the said manyam land and now we are watching the tower of the said Meenakshi Amman temple and enjoying the inam land."

The land apparently was not then assessed, but if it had been it would have been assessed at the figure Rs. 43-2-9. On the basis of this statement, which has been marked as Ex. B, the Deputy Collector recommended that there should be a jodi of Rs. 8-10-2 per annum and this recommendation was accepted by the Inam

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Commission. In holding that the inam included both the varams the Subordinate Judge relied on the entry in column 4 of the Ex. B. There is there the plain statement that the land was "given" to ancestors of the inamdars by the Rajas of the Karnatic for watching the tower. The words used imply a gift of the soil to the inamdars, and consequently the Subordinate Judge was right in holding that they became entitled to both the melvaram and the kudivaram.

It has been suggested by the learned advocate for the appellants that the judgment of Venkatasubba Rao, J., in *Chidambara Gurukkal* v. *Sundaram Pillai*,[1] reads the word "land" in an inam grant in a different sense. It is clear from the judgment in that case that the learned Judge was merely interpreting the word in the light of the context. The grant in that case has nothing in common with the statement in Ex. B.

For the appellants it is said that the statement made in Ex. B should be rejected because in a mortgage deed executed in 1899 and in subsequent deeds of a similar nature the mortgagors stated that the land mortgaged was their ancestral property in which four-fifths of the kist had been remitted in their favour as remuneration for the performance of the Sikaram kaval service at the temple. We do not attach the same importance to these recitals as to the statement in Ex. B. There would naturally be difficulty in mortgaging the lands if it was confessed that both the varams belonged to the mortgagors on terms of service. The Subordinate Judge has described the recitals in the mortgage deeds as "self-serving" and in view of the statement in Ex. B this may very well be the case.

There is another factor which supports the conclusion of the Subordinate Judge and that is that the total income from the lands granted was small. At the time of the inam settlement the total income of both the parcels of land amounted to no more than Rs. 136 per annum. Assuming the melvaram to be a half of the total income this meant Rs. 68 for the services of four men continuously on duty night and day for three hundred and sixty five days in the year. It works out at less than Rs. 1-8-0 per man per month. It is true that the temple authorities have provided the watchers with their meals, but even taking this into consideration the remuneration would be very small indeed. We consider that they must have got more than the melvaram for the services agreed upon.

The Subordinate Judge has carefully considered all the factors in the case and we can see no reason to disturb his decision. Consequently the appeal will be dismissed with costs.

B.V.V. ——— *Appeal dismissed.*

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1. (1924) 47 M.L.J. 598.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

The Official Receiver, West Tanjore, Tanjore .. *Appellant** (*Respondent*)

v.

K. Sambasiva Ayyar and others .. *Respondents.* (*Appellants.*)

The Official Receiver, West Tanjore *v.* Sambasiva Ayyar.

Provincial Insolvency Act (V of 1920), S. 51 (1)—Acceptance of insolvency petition with direction to deposit charges for publishing notice of petition—Date of admission of petition—"Benefits of execution"—Ascertainment of—Costs of suit as well as execution proceedings if to be deducted—Sale in execution in separate lots—Sale when complete—Interest on the amount to be refunded—Inherent jurisdiction of Court to grant.

In admitting an insolvency petition all that the Court is concerned with is to see whether the petition itself complies with the requirements of the law. If it does, then it admits it. It cannot be said that such a petition must be deemed to have been admitted only on the date when the costs of publishing the notice of the petition are paid.

Where properties are sold in execution in separate lots the sale of each lot is complete when the whole of the balance of the purchase-money of such lot is deposited in Court. It cannot be contended that the assets could not be deemed to be received by the Court until the purchase consideration for all the lots had actually been deposited into Court. The decree-holder is bound to return to the Official Receiver the purchase price for that lot in respect of which the balance was paid only after the admission of the petition for adjudication. He can, in so refunding, deduct from the amount merely the costs of the execution proceedings and not the costs of the suit out of which the proceedings arose.

The Court can under its inherent powers direct the refund to be made with interest in a case of this kind.

(1941) 2 M.L.J. 918, affirmed.

Appeals under Cl. 15 of the Letters Patent against the orders of the Hon'ble Mr. Justice King, dated the 24th September, 1940 and passed in A.A.A.O. No. 127 and 136 of 1939 (reported in (1941) 2 M.L.J. 918) preferred to the High Court against the order of the District Court of West Tanjore at Tanjore, dated the 27th July, 1939 and made in C.M.A. No. 53 of 1938 preferred against the order of the Court of the Subordinate Judge of Tanjore, dated the 3rd September, 1938 and passed in I.A. No. 276 of 1936 in I.P. No. 15 of 1933.

T. K. Subramania Pillai for Appellant.

R. Sundaralingam and *A. V. Visvanatha Sastri* for Respondents.

The Judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—In these appeals the Court is concerned largely with the effect of S. 51 (1) of the Provincial Insolvency Act and several interesting questions of law are involved.

In O.S. No. 4 of 1933 on the file of the Court of the Subordinate Judge of West Tanjore the 4th respondent in L.P.A. No. 38 of 1940 obtained a money decree against one Kasinatha Aiyar, who in that year was adjudicated insolvent. In execution of the

* L.P.A. Nos. 37 and 38 of 1940. 18th February, 1942.

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decree he attached immovable properties belonging to the judgment-debtor. There were three lots of properties, two of them being situate in the village of Anakkudi and the third in the village of Manikandi. The Court ordered all the properties to be sold on the same date, but in separate lots. The sales took place on the 30th June, 1933. The two lots in Anakkudi village were sold for an aggregate sum of Rs. 7,500, which was paid into Court by the purchasers on the day of the sale. The lot in Manikandi village was sold for Rs. 4,520, of which 25 per cent. was paid into Court immediately and the balance on the 4th July, 1933. On the 3rd July, 1933 a petition was filed in the Subordinate Judge's Court asking for the adjudication of Kasinatha Aiyar and in due course he was adjudicated on this petition. The proceeds of the sale of the insolvent's properties in the execution proceedings were rateably distributed between the decree-holder and five other creditors, who had also obtained decrees against Kasinatha Aiyar. On the 7th October, 1936 the Official Receiver of West Tanjore filed an application asking the Court to direct the six creditors who had participated in the sale proceeds to refund the sums which they had received, but the Subordinate Judge dismissed it on the ground that the properties had been sold before the admission of the insolvency petition. The Official Receiver appealed to the District Judge of West Tanjore, who reversed the decision of the Subordinate Judge. The District Judge considered that the properties had been sold after the admission of the petition.

Against the order of the District Judge allowing the Official Receiver's application two appeals were filed, one by respondents 1, 2, 4 and 6 in L.P.A. No. 38 of 1940 and the other by the third respondent in that appeal. The appeals were heard by King, J., who held that the insolvency petition had been admitted on the 3rd July, 1933, that is, three days after the Rs. 7,500 had been paid into Court and one day before the balance of the Rs. 4,250 realized for the Manikandi property was paid into Court and that by reason of S. 51 of the Provincial Insolvency Act the creditors were entitled to keep the Rs. 7,500, but they were bound to refund the Rs. 4,520, although the decree-holder was entitled to deduct from what he had received out of the Rs. 4,250 the costs incurred by him in the execution proceedings. The learned Judge also held that the Official Receiver was entitled to interest on the moneys which the creditors had wrongly withdrawn from the Court. These Letters Patent Appeals have been filed by the Official Receiver. The respondents have filed memoranda of cross objections. So far as the Official Receiver is concerned, he only challenges the finding of King, J., that the creditors were entitled to retain the Rs. 7,500. Read together, the memoranda of cross-objections raise all the questions decided against the creditors by the learned judge.

S. 51 (1) of the Provincial Insolvency Act reads as follows:

> "Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition."

The Official Receiver, West Tanjore v. Sambasiva Ayyar.

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Whether the creditors are to be allowed to retain the Rs. 7,500 depends on whether King, J., was right in holding that the petition had been admitted on the 3rd July, 1933 and that the money had been 'realized' within the meaning of the section before that date. The claim to the refund of the Rs. 4,520 stands on a different footing because three-fourths of this sum was not paid into Court until the 4th July, 1933, and by reason of the decision of this Court in *Ramanathan Chettiar* v. *Subramania Chettiar*,[1] the sum of Rs. 4,250 could not be deemed to have been realized until the balance had been paid.

Admittedly the insolvency petition was presented to the Subordinate Judge on the 3rd July, 1933 and on that date the Subordinate Judge wrote on the petition these words: "Check and file emergently". The petition was checked and taken on the file on the same day, whereupon the Court ordered that the charges for publishing the notice of the petition should be deposited by the petitioner by the 7th July. The costs were deposited on that date and accordingly publication was ordered.

It is contended for the respondents that the petition must be deemed to have been admitted when the costs of the publication were paid on the 7th July; but this contention ignores the fact that the petition was taken on the file on the day on which it was presented, and that means that this was done after it had been checked and found to be in order. The fact that the Court ordered the costs to be paid by the 7th July in itself showed that the Court had already admitted the petition. It has been said that the decisions of this Court in *Narasimha Pattamahadevi* v. *Annan Naidu*,[2] and *Chidambaram Pandaram* v. *Lakshminarayana Chettiar*,[3] indicate that the petition could not be regarded as being admitted until the notice requiring payment of the costs of publication was issued. Both those cases were, however, concerned with the first proviso to Rule 90 of O. 21, Civil Proceedure Code, in which it is provided that where an application is made for an order setting aside a sale on the ground of irregularity or fraud the Court may call upon the applicant *before admitting the application*, either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realized by the sale, whichever is less, or to deposit the amount into Court. There is here provision for what the Court may do before admitting the application in the particular circumstances. In admitting an insolvency petition all that the Court is concerned with is seeing whether the petition itself complies with the requirements of the law. If it does, then it admits it; and this is what happened on the date on which the petition against Kasinatha Aiyar was presented.

In support of the plea of the Official Receiver that the creditors were not entitled to retain the Rs. 7,500, Mr. Sitarama Rao relies on the judgment of White, C.J., in *Ramanathan*

1. (1924) 47 M.L.J. 759: I.L.R. 48 Mad. 656.
2. (1940) 1 M.L.J. 350.
3. (1941) 2 M.L.J. 109.

The Official Receiver, West Tanjore *v.* Sambasiva Ayyar.

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Chettiar v. *Subramania Sastrigal,*[1] which was accepted as embodying a correct statement of the law by Beasley, C.J., in the unreported case of *V. E. R. M. K. Krishnan Chettiar* v. *Perianna Chettiar.*[2] In *Ramanathan Chettiar* v. *Subramania Sastrigal,*[1] the properties of the judgment-debtor were attached and brought to sale. They consisted of two lots of immovable properties. The proceeds of the sale of the first lot were paid into Court, but before the proceeds of the sale of the second lot had been paid in, another execution creditor applied under S. 295 of the Code of Civil Procedure, 1882, for rateable distribution. It was held by White, C.J., who was sitting alone, that the other execution creditor was entitled to participate in a rateable distribution in the sale proceeds of the two parcels as the assets had not been realized within the meaning of the section until the whole of the proceeds of the properties sold in execution had been paid into Court, and the other execution creditor had applied before the price of the second parcel had been realized. Mr. Sitarama Rao, says that the same principle must be applied here and inasmuch as the Rs. 4,520 which represented the sale proceeds of the Manikandi lot, was not paid in until after the insolvency petition had been admitted, there was no realization of any of the assets in the course of execution before the date of admission of the petition. The judgment in *Ramanathan Chettiar* v. *Subramania Sastrigal,*[1] was quoted in the judgment of the Bench which decided *Ramanathan Chettiar* v. *Subramania Chettiar,*[3] although it is conceded that the question raised in that appeal was not the same as that raised in *Ramanathan Chettiar* v. *Subramania Sastrigal.*[1] The judgment in *Ramanathan Chettiar* v. *Subramania Sastrigal,*[1] was also accepted by the Calcutta High Court in *Barendra* v. *Martin & Co.,*[4] but there is a later decision in *Girindranath Ray* v. *Kedar Nath Bidyanta.*[5] In that case different lots of properties were sold in execution under the same proclamation, but, as here, each lot was offered separately. Although the decisions in *Ramanathan Chettiar* v. *Subramania Sastrigal,*[1] and *Barendra* v. *Martin & Co.,*[4] were not quoted, it was contended that the assets could not be deemed to be received by the Court until the purchase consideration for all the lots had actually been deposited into Court. In rejecting this contention the Court pointed out that the properties were sold separately, the sale proceeds were realized separately, and the sale of each lot was completed when the whole of the balance of the purchase-money was deposited in Court.

In discussing the judgment in *Ramanathan Chettiar* v. *Subramania Sastrigal,*[1] King, J., clearly indicated that he considered that the case had been wrongly decided and there is much to be said in support of this opinion. In this case, however, we are not considering S. 295 of the Code of 1882 or S. 73 of the present Code. The Court is concerned with the interpretation of S. 51 (1) of the Provincial Insolvency Act and if the words used

1. (1902) 12 M.L.J. 276: I.L.R. 26 Mad. 179.
2. C.R.P. No. 1030 of 1930.
3. (1924) 47 M.L.J. 759: I.L.R. 48 Mad. 656.
4. (1920) 33 C.L.J. 7.
5. (1924) 29 C.W.N. 575.

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here are to be given their ordinary meaning, the argument advanced on behalf of the Official Receiver is unsustainable. The section says that no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution before the date of the admission of the insolvency petition. Where property is sold in execution and the money is paid into Court, that money represents assets realized in the course of the execution. When there are several properties sold separately and the moneys are paid into Court separately the position is exactly the same. When the Rs. 7.500 was paid into Court by the purchasers of the Anakkudi properties, the money represented assets realized in the course of the execution.

In *Ramachandra Aiyar* v. *Primathi Ammal*,[1] Abdur Rahim, J., expressly held that where property is sold in lots there are separate sales, notwithstanding that all of them had taken place under one proclamation, and this principle was recognised and applied by a Bench of this Court in *Narasimhamurthi* v. *Official Receiver, West Godavari*.[2] In that case some vacant land and a house were sold separately in execution proceedings. There was material irregularity in the publication of the sale notice. The Court set aside the sale of the vacant land, but refused to set aside the sale of the house because no substantial loss had been suffered. The judgments in these cases run counter to the judgment in *Ramanathan Chettiar* v. *Subramania Sastrigal*,[3] and lend strong support for the interpretation given by King, J., of S. 51 of the Provincial Insolvency Act which we accept.

In the memoranda of cross-objections filed by the respondents objection is taken to the judgment of the learned Judge in that it directed the respondents to refund the Rs. 4,520, but in view of the decision of this Court in *Ramanathan Chettiar* v. *Subramania Chettiar*,[4] this objection very properly was not pressed.

The two questions which remain for decision are (1) whether in refunding the Rs. 4,520 the sixth respondent is entitled to an allowance in respect of the costs of the suit instituted by him as well as the costs of the execution proceedings and (2) whether the learned Judge was right in directing the respondents to pay interest on the Rs. 4,520 which they withdrew from Court unlawfully. With regard to the right to deduct the costs incurred in the suit and execution proceedings three decisions of this Court have been quoted to us, namely that of Pakenham Walsh, J., in *Swaminatha Aiyar* v. *Official Receiver, South Malabar*,[5] that of Abdur Rahman, J., in *Balarama Reddi* v. *Official Receiver, Nellore*,[6] and that of Wadsworth, J., in the unreported case of *Nune Krishnamurthi* v. *Mothey Narayana Rao*.[7] In *Swaminatha Aiyar*

1. 1910 M.W.N. 834.
2. (1935) I.L.R. 59 Mad. 438.
3. (1902) 12 M.L.J. 276: I.L.R. 26 Mad. 179.
4. (1924) 47 M.L.J. 759: I.L.R. 48 Mad. 656.
5. (1933) 65 M.L.J. 402: I.L.R. 57 Mad. 330.
6. (1939) 1 M.L.J. 205: I.L.R. 1939 Mad. 343.
7. A.A.O. No. 175 of 1937.

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v. *Official Receiver, South Malabar*,[1] Pakenham Walsh, J., held that a creditor was entitled under S. 51 of the Provincial Insolvency Act to a charge on the sale proceeds for the expenses incurred by him in bringing the property attached to sale and he considered that the word 'benefit' in S. 51 meant the nett realization in execution after payment of the costs. It is not clear from the judgment whether the learned Judge intended to include the costs of the suit, but as he made reference to the provisions of S. 52 this might have been his intention. The decision of Abdur Rahman, J., in *Balarama Reddi* v. *Official Receiver, Nellore*,[2] is to the effect that a decree-holder who has been required to make a refund as the result of the adjudication of the judgment-debtor is not entitled to retain anything for costs out of the money realized by him in execution. The opinion expressed by Wadsworth, J., in *Nune Krishnamurthi* v. *Mothey Narayana Rao*,[3] is in agreement with that of Pakenham Walsh, J. In arriving at his decision, Wadsworth, J., considered both the judgments of Pakenham Walsh, J., and of Abdur Rahman, J. King, J., preferred the opinion expressed by Pakenham Walsh, J., and Wadsworth, J., but he only allowed the creditors to deduct the costs of the execution proceedings, not the costs of the suit.

As we have seen, S. 51, precludes a person from retaining any benefit of the execution against the Official Receiver except assets realized before the date of the admission of the petition. S. 52 states that where execution of a decree has issued against the property of a debtor which is saleable in execution, and before the sale takes place notice is given to the Court executing the decree that an insolvency petition by or against the debtor has been admitted, the Court shall direct the property, if in the possession of the Court, to be delivered to the receiver; but the section proceeds to direct that the costs of the suit in which the decree was made and of the execution shall be a first charge on the property so delivered. The receiver is then empowered to sell the property for the purpose of satisfying the charge. The argument advanced on behalf of the creditors is this. S. 52 clearly recognises a right to a charge on the property attached in respect of the costs of the suit, if before the sale takes place notice of the insolvency is given to the Court which ordered the attachment. Therefore a decree-holder should not be in any worse position because the sale has in fact taken place.

This argument would be sound if Ss. 51 and 52 could be read together, but in our opinion the wording of S. 51 precludes this. The sale here has taken place and the creditors are by S. 51 required to refund any benefit received by them from the assets realized in the course of the execution. We accept the argument of the creditors that they are entitled to take into account the costs incurred in the execution proceedings, as the benefit of the execution is what remains after such costs have been paid; but whether they are entitled to the costs of the suit seems to us to be quite another matter. The property was sold in execution for the pur-

1. (1933) 65 M.L.J. 402: I.L.R. 57 Mad. 330.
2. (1939) 1 M.L.J. 205: I.L.R. 1939 Mad. 343.
3. A.A.O. No. 175 of 1937.

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pose of realizing the decretal amount and the costs awarded. Therefore, if the decree-holder is given the costs of the suit out of the assets realized he is getting a benefit out of the execution, and S. 51 says he is not entitled to this. It may very well be that the effect of S. 51 was not fully realized when it was incorporated in the statute. It is certainly remarkable that the decree-holder is in far better position if notice of insolvency is given to the Court before the sale than afterwards, but the Court can only construe S. 51 according to its wording. We consider, having regard, as we must, to its wording, that King, J., took the correct course in allowing the creditors to deduct merely the costs of the execution proceedings and not the costs of the suit out of which those proceedings arose. It follows that in our opinion the decision of Abdur Rahman, J., in *Balarama Reddi* v. *Official Receiver, Nellore,*[1] so far as the costs of the execution proceedings are concerned, should not be followed.

Coming now to the question of interest, there is no provision in the Insolvency Act conferring upon the Official Receiver the right to recover from the respondents the Rs. 4,520 with interest, but the learned Judge allowed interest as he agreed with the District Judge that the situation was analogous to one in which restitution is ordered under S. 144 of the Code of Civil Procedure. Admittedly the provisions of that section do not apply here and interest can only be ordered on the ground that it is just and equitable to do so. O. 21, r. 93 of the Code of Civil Procedure states that, where a sale of immovable property is set aside under r. 92, the purchaser shall be entitled to an order for re-payment of his purchase-money, with or without interest, as the Court may direct. We have no doubt that under its inherent powers the Court can in a case of this nature direct a refund to be made with interest, if it considers that it is just to do so. Mr. Viswanatha Sastri for the respondent says however, that the Official Receiver should not be allowed interest from any date anterior to the 7th October, 1936, when he demanded refund of the money. The sale of the property was confirmed on the 15th January, 1934, but the judgment-debtor applied for an order directing the sale to be set aside under O. 21, r. 90. The Court refused the application and an appeal was filed. This appeal was supported by the Official Receiver and he continued to support the application until the 16th October, 1935. In these circumstances, there is substance in the contention of the respondents that interest should not be allowed from any date anterior to the date of demand and we alter the decree passed by the learned Judge to this extent.

The result is that both the appeals fail and will be dismissed with costs. The memoranda of cross-objections also fail, except in so far as interest has been disallowed to the receiver for the period between the date of the withdrawal of the money from the Court and the date of demand by him for payment. The parties will pay and receive proportionate costs in respect of the memoranda of cross objections.

K.S. ——— *Appeals dismissed.*

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1. (1939) 1 M.L.J. 205: I.L.R. 1939 Mad. 343.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Mattapalli Raju and others .. *Appellants** (*Petitioners*)

v.

Challa Mahalakshmamma and another .. *Respondents* (*Respondents*).

Mattapalli Raju *v.* Challa Mahalakshmamma.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Compromise decree—Application for scaling down—Uncertified payments—Whether provable.

If for the purpose of scaling down a debt embodied in a decree the Court finds it necessary to ascertain what payments have been made towards that decree, the bar in O. 21, r. 2, Civil Procedure Code, would not prohibit the proof of payments which have not been certified.

Ramamurti v. *Sitaramayya*, (1940) 2 M.L.J. 293, explained.

Appeal against the order of the Court of the Subordinate Judge of Cocanada, dated 31st August, 1940 and made in I.A. No. 708 of 1938 in O.S. No. 33 of 1920, etc.

V. Viyyanna for Appellants.

K. Mangachary for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This appeal arises out of an application under S. 19 of Madras Act IV of 1938 seeking to scale down a compromise decree. The appellants here who are the legal representatives of the deceased first defendant, applied to the lower Court alleging in general terms that the decree obtained by the second respondent and transferred by him to the first respondent, had been satisfied by the payments made if the benefit of Act IV were given to the applicants who were agriculturists. The counter affidavit filed by the first respondent alleged that a substantial amount is still due under the decree and denied that the applicants were entitled to the benefits of the Act. When the case came on before the lower Court the right of the applicants to the benefits of the Act was established and the contentions urged centred round certain specific allegations relating to consideration and interest. We are now only concerned with the allegation of the appellants that the interest due upto 1930 had been satisfied. The rights of the plaintiff—second respondent here were assigned under Ex. A in November, 1929. The deed of transfer says nothing about outstanding interest. It is alleged that in the lower Court the appellants filed certain receipts establishing the payment of the interest due for 1930 and that these receipts were not exhibited owing to an error or misunderstanding in the lower Court. The memorandum of calculations filed on behalf of the appellants clearly assumes that all interest upto the beginning of 1930 was discharged and that interest had to be paid for the subsequent years. The memorandum of calculations filed on behalf of the decree-holder assumes that interest due for

*Appeal No. 48 of 1941 (A.A.O. No. 609 of 1940, converted into an appeal), and C.M.P. No. 483 of 1941. 6th April, 1942.

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the year 1929-30 had not been paid and this interest was treated as contributing to the amount claimed by the decree-holder. The lower Court in its judgment says nothing about any contention regarding the interest for 1929-30, but proceeds to discuss a contention that interest was not payable for the three subsequent years. Quite clearly this discussion is due to a misunderstanding, for the appellants in their memorandum of calculations concede that interest for the years 1931 to 1933 was payable. It is suggested for the respondents that the lower Court has not considered the question of these uncertified payments towards the interest of 1929-30, because of the implications of a decision of ours in the case of *Ramamurti* v. *Sitaramayya.*[1] In that case we were concerned with the scaling down of a decree under Ss. 8 (1) and 19 of the Act. We dealt with the contention that the petitioner could not prove uncertified payments made towards the decree because of the terms of O. 21, r. 2, Civil Procedure Code. We pointed out that S. 19 was merely concerned with the amendment of the decree in accordance with the terms of Act IV of 1938 and with the addition of a power to the Court to enter satisfaction when the scaling down process under the Act resulted in the extinction of the decree. Then after pointing out that the section is not concerned with execution we proceeded to deal with the proviso which relates to payments made in respect of the decree and provides that they shall first be applied in payment of all costs as originally decreed and we pointed out that in making these appropriations the trial Court is not acting as an executing Court and that consequently the provisions of O. 21, r. 2, Civil Procedure Code, do not bar the petitioner from proving payments which have not been certified in the manner necessary for establishing them in an executing Court and we held that the judgment-debtor can prove payments which have not been certified for the purpose of satisfying the decree regarding costs. Then follows the sentence "For any other purpose, there is no express provision allowing the petitioner to prove payments made after the decree and not recorded by the Court and it seems to follow that he would have to establish those payments in the ordinary way by getting them certified in Court if he wants them to be taken into consideration as payments towards the decree." This sentence is not part of the decision itself and is an observation which perhaps goes further than was necessary for the case or was justified by the view taken on the effect of the statutory provisions. No doubt S. 19 of the Act necessitates the taking into account of all payments made towards the decree, whether certified or not, which affect the scaling down process under the Act. For instance, in order to apply S. 8 (2) and 8 (3) of the Act to a decree-debt, it is necessary to know what payments have been made and the Court conducting this enquiry under S. 19 of the Act, not being an executing Court would not be subject to the prohibition in O. 21, r. 2 of the Civil Procedure Code. We are clearly of opinion that if for the purpose of scaling down a debt embodied in a decree, the Court finds it necessary to ascertain what payments have been made towards that

1. (1940) 2 M.L.J. 293.

decree, the bar in O. 21, r. 2, Civil Procedure Code, would not prohibit the proof of payments which have not been certified. To the extent to which the decision quoted seems to suggest any other view we wish to make it clear that that was not our intention.

The appellant has filed a petition to admit in appeal documents relating to those alleged uncertified payments. It is not clear to us that this evidence was positively tendered and rejected in the lower Court. But what is clear is that the lower Court has not correctly understood the nature of the contention before it regarding the discharge of interest for the year 1929-30. Unfortunately the pleadings did not bring out clearly the points really at issue between the parties in this respect and it is probably the fault of those responsible for presenting the appellants' case in the trial Court that the Court misunderstood the nature of the real contention. This is not in our opinion a proper case for admitting this evidence in appeal, but it is a proper case for sending the matter back to the trial Court in order that a finding may be recorded on the question whether any amount was due for interest for 1929-30 having regard to the evidence of payments, whether certified or not which was available.

We allow the appeal, but, having regard to the way in which the case was apparently presented before the lower Court, we think it proper that the appellants should pay the respondents' costs in this Court. The application is remanded to the lower Court for fresh disposal in the light of this judgment after recording a finding on the question relating to the interest for 1929-30. Both parties will be permitted to file fresh evidence on this question. The costs in the lower Court to abide by the result. We regret that under the rules we are obliged to allow a refund of the Court-fee paid on the memorandum of appeal. The petition to admit fresh documents in appeal is dismissed.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

D. Anjaneya Sastri .. *Appellant** (*1st Deft.*)

v.

T. R. Rajagopala Chettiar, trustee of Chinna Ramanuja Koodam .. *Respondent* (*Plaintiff*).

Adverse possession—Father trustee of a charity—Suit property in enjoyment of father and son for more than 12 years—Purchaser from them in auction—Purchaser claiming title to it—Whether son prevented by disability of his father's fiduciary capacity, from owning property in himself and claiming adverse possession.

If two persons are in joint enjoyment of property belonging to another adversely to the latter but one is disabled by his fiduciary relationship to the owner, from acquiring any interest in the property by adverse possession, the other who is under no such disability can acquire title to the property to the extent of his enjoyment; the fact that the two persons happen

* S.A. No. 856 of 1939. 13th March, 1942.

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to be members of a joint Hindu family owning other properties as a unit with no defined shares therein can make no difference to the application of the principle.

Where a trustee of a charity sued to recover possession of a house from a person who claimed title to it under an auction-purchase in execution of a decree obtained against one *M* and his son, *M* having himself been a prior trustee of the same charity and having no beneficial interest in it, and the property was found to have been in the possession of *M* and his son for more than the statutory period for perfecting the claim of adverse possession,

Held, that the principle of the decision of the Privy Council in *Sri Sri Iswari Bhubaneshwari Thakurani* v. *Brojo Nath Dey,* (1937) 2 M. L. J. 527: L. R. 64 I. A. 203: I. L. R. (1937) 2 Cal. 447 (P. C.), will apply and the adverse possession of the son will not be affected by the fiduciary disability attaching to the father in his capacity as trustee and there would be nothing to prevent his acquiring title by adverse possession to a half share of the property.

Appeal against the decree of the District Court of West Tanjore at Tanjore in A.S. No. 208 of 1936, preferred against the decree of the Court of the Subordinate Judge of Kumbakonam in O.S. No. 49 of 1933.

T. V. Muthukrishna Aiyar and *S. Panchapagesa Sastri* for Appellant.

K. V. Sesha Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit brought by the respondent for recovery of a house in Kumbakonam. His case is that the house was dedicated to a charity known as Chinna Ramanuja Koodam and that as the trustee appointed under a scheme decree passed in 1931, he is entitled to recover it from the appellant who claims title to it under an auction-purchase in execution of a decree obtained against one Malayaperumal Chetty and his son. It was alleged that Malayaperumal held the property as the trustee of the charity prior to the appointment of the respondent and had no beneficial interest therein, and that therefore the appellant did not acquire a valid title under his purchase in Court auction. On the other hand, the appellant denied the alleged dedication of the property and claimed that in any event Malayaperumal and his sons having been in possession and enjoyment of it as beneficial owners they acquired by prescription an absolute title which passed to the appellant under the execution sale. The Courts below negatived the contentions and decreed the suit. In this appeal, however, the appellant has limited his claim to a half share only in the suit property conceding that the property had been dedicated to the trust and that Malayaperumal as the previous trustee could not acquire any interest therein by adverse possession; but he urged that Malayaperumal's son Sitharama Chetty having also been in possession and enjoyment of the property along with Malayaperumal and, unlike his father, being under no disability, acquired a half share therein by prescription which passed to the appellant as auction-purchaser.

The facts so far as they are material here may be briefly stated. The house in question was constructed for purposes of a Chatram charity by Abhayambal the adoptive mother of Malayaperumal in 1885. The latter sued her in 1887 for the

recovery of the house and other properties in her possession and the suit ended in a compromise whereby it was agreed that the house should be set apart as a choultry and that one Krishnaswami Chetty during his life, and thereafter Malayaperumal, should manage the charity as trustee. Krishnaswami Chetty died in 1893, but the property continued in the possession of his sons till 1897, when Malayaperumal took possession of the house on behalf of the trust, and continued to manage the charity till 1903. In that year however, he began to deny the trust and purported to lease the house under Ex. VII as the property of his family. Thereafter the house was enjoyed by Malayaperumal and his sons along with the other properties admittedly belonging to the family, and in 1916 one of Malayaperumal's sons executed a release deed (Ex. XIII) relinquishing his interest in all the properties to his father and brothers and the deed referred to the house as their family property. Malayaperumal and his other two sons mortgaged family properties in 1917 to one Sivagurunatha Chetty and included the house in question in that mortgage. In 1918 another son of Malayaperumal separated himself from the family releasing his interest in the family properties including the house in favour of Malayaperumal and his third son Sitharama Chetty who continued undivided, and in 1920 Malayaperumal and Sitharama Chetty again effected a mortgage of their family properties including the suit house therein. It will thus be clear—and indeed it was not seriously disputed—that from 1903 onwards the house was treated and enjoyed by Malayaperumal and his sons as part of their family properties in derogation of the rights of the trust. The appellant, as already observed, purchased the house when it was brought to sale in execution of a decree obtained against Malayaperumal and Sitharama in 1928 and obtained delivery of possession in due course. Thereupon Abhayambal brought a suit under S. 92 of the Civil Procedure Code alleging that the house was charity property and praying that a scheme should be settled for the management of the property and due performance of the charity. The appellant herein who was impleaded in that suit denied that the property had been dedicated to the charity but the Court found that there had been a valid dedication and passed a decree settling a scheme for the management of the property and the proper conduct of the charity appointing the respondent herein as the trustee for the purpose. As the appellant herein however continued in possession, the respondent has brought the present suit for its recovery on behalf of the trust.

Mr. Muthukrishna Aiyar for the appellant contended that although Malayaperumal being himself the trustee of the charity was under a fiduciary disability in the matter of acquiring the property adversely to the trust, his son Sitharama was under no such disability, and as the latter was in enjoyment of the property through Malayaperumal who was in possession on behalf of himself and his sons, he (Sitharama) acquired title by adverse possession. In support of this contention the learned counsel placed strong reliance upon the decision of the Privy Council in *Sri Sri Iswari Bhubaneshwari Thakurani* v. *Brojo Nath*

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Dey,[1] on appeal from the decision of the Calcutta High Court in *Surendrakrishna Ray* v. *Shree Shree Ishwar Bhubaneshwari Thakurani*.[2] That was also a case, where a person claiming to be a shebait of a family deity sued to recover properties alleged to have been dedicated to the deity and a plea of limitation and adverse possession was raised. It appears that the properties had been originally dedicated but in a partition suit among the members of the family a consent decree was passed providing that the dedication should be set aside and the properties were to be divided and enjoyed as ordinary family properties. One of the branches of the family entitled to a half share in the properties consisted of two brothers who however continued to hold their share without actual division as between themselves. Such enjoyment continued for more than twelve years before the suit was brought and the question arose whether the claim put forward on behalf of the deity was barred by the adverse possession of the brothers. It was common ground that according to the terms of the original dedication, the office of shebait devolved upon the elder brother alone and the younger brother was never a shebait of the idol. On these facts it was decided by the Calcutta High Court, and the decision was upheld by their Lordships on appeal, that so far as the younger brother's share in the properties was concerned, the title of the deity was extinguished by adverse possession although the elder brother being the shebait was under a fiduciary disability in the matter of possessing adversely to the trust. Lord Macmillan who delivered the judgment of the Board observed:

> "From 1904 onwards for at least 12 years Satya (*i.e.*, the younger brother) openly and without any fraudulent collusion enjoyed continuous possession of his share of the *thakurbari* and *shebait's* house on the basis that the consent order of 1904 was effective and that the property was not subject to dedication. * * * * * * * True, the possession of Satya for the 12 years from 1904 was jointly with Pulin, but Satya was not affected by any fiduciary disability attaching to Pulin and there was nothing to prevent his possession of his half from being adverse to the appellant idol".

It will be seen that the facts of the case before their Lordships are closely analagous to the facts of the present case and I find it difficult to accept the contention of Mr. Sesha Aiyangar for the respondent that the decision has no application here. He attempted to distinguish that case by pointing out that the brothers held the properties in several shares, whereas here Sitharama Chetty had no defined share in the joint family properties and the house in suit having been enjoyed as part of such properties, he could not be deemed to have acquired any specific share therein by adverse possession when the manager Malayaperumal was disabled by reason of his trusteeship from holding the properties adversely to the trust. But if the possession of the elder brother in the case before their Lordships could be regarded as the possession of the younger to the extent of the latter's share of the properties and as having been held to that extent adversely to the trust notwithstanding that the former was the trustee, it is

1. (1937) 2 M.L.J. 527: L.R. 64 I.A. 203: I.L.R. (1937) 2 Cal. 447 (P.C.).
2. (1932) I.L.R. 60 Cal. 54.

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difficult to see why the same principle should not be applied to the case of a junior member of a joint family who is in enjoyment of property adversely to the trust through the manager trustee. The decision of their Lordships would seem to proceed on the broad principle that where two persons are in joint enjoyment of property belonging to another adversely to the latter but one is disabled by his fiduciary relationship to the owner from acquiring any interest in the property by adverse possession, the other who is under no such disability can acquire title to the property to the extent of his enjoyment, and it seems to me that the fact that the two persons happen to be members of a joint Hindu family owning *other* properties as a unit with no defined shares therein can make no difference to the application of this principle.

In this view, the further point raised on behalf of the appellant does not call for consideration.

The appeal succeeds and the respondent will have a decree for partition and delivery of only a half share in the suit property together with proportionate mesne profits. The appellant will have his costs of this appeal. In the Courts below, the parties will pay and receive proportionate costs. The costs of the respondent will come out of the trust estate.

Leave granted.

K.C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Kuchibhotla Venkatasubba Rao .. *Appellant** *(3rd Deft.)*

v.

Chandanmal and another .. *Respondents* *(Plff. and 2nd Deft.).*

Kuchibhotla Venkatasubba Rao v. Chandanmal.

Contract—Consideration—Agreement to stifle threatened prosecution for offence under S. 420, Penal Code—Non-enforceability.

Where two persons (second and third defendants) joined in signing a promissory note executed by the first defendant in consideration of the payee undertaking not to prosecute him for a criminal offence punishable under S. 420 of the Indian Penal Code, which he had committed and the offence was one which could not be compounded without the Court's sanction,

Held, that the consideration for the note so far as the second and third defendants were concerned was manifestly unlawful, for notwithstanding that no prosecution was launched the offence remained and hence the note was unenforceable.

Chandanmal v. *Ramakrishnayya,* (1941) 2 M.L.J. 827, reversed.

Appeal under Cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Somayya, dated 19th day of August, 1941 and passed in S.A. No. 789 of 1939, since reported in (1941) 2 M.L.J. 827, preferred to the High Court against the decree of the Court of the Subordinate Judge of Bezwada in A.S. No. 108 of 1938 (O.S. No. 51 of 1936, District Munsif's Court, Bezwada).

P. Somasundaram for Appellant.

S. Srinivasachari and *K. Bhimasankaram* for Respondents.

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*L.P.A. No. 41 of 1941. 8th July, 1942.

Kuchibhotla Venkatasubba Rao v. Chandanmal.

Leach, C.J.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal must be allowed. The first respondent instituted a suit in the Court of the District Munsif of Bezwada to recover from the three defendants a sum of Rs. 2,086-14-6, which he claimed to be due on a promissory note, which the defendants had executed in his favour. The instrument was executed in these circumstances. The first defendant had borrowed moneys from the plaintiff on the security of what were represented to be cases of marketable goods, namely condensed milk and an ayurvedic medicine put up separately in bottles. The loan was not repaid and the plaintiff, as the pledgee, decided to sell them, which, of course, he had a right to do. The packages were opened for the purpose of sale and it was then found that they contained stones, husk, saw-dust, waste paper, etc. A gross fraud had been committed by the first defendant on the plaintiff and there can be no doubt that the fraud involved an offence of cheating punishable under S. 420 of the Indian Penal Code. It is not surprising that when the fraud was discovered the plaintiff threatened to prosecute the first defendant. He was, however, induced to refrain from taking this step in consideration of the second and third defendants, who are relations of the first defendant, joining in the execution of the promissory note in suit. More than Rs. 2,800 was due to the plaintiff but he agreed to accept this sum, of which Rs. 750 was paid in cash and a promissory note given for Rs. 2,050. The District Munsif found that the second and third defendants joined in signing the promissory note in order to stifle the threatened prosecution and the finding was concurred in by the Subordinate Judge of Bezwada on appeal. Therefore the finding is not now open to question. When the plaintiff launched his suit the second and third defendants pleaded that they were not liable as the consideration was unlawful. This defence was accepted by the District Munsif who passed a decree for the amount against the first defendant alone. The District Munsif's decision was upheld by the Subordinate Judge. The plaintiff then appealed to this Court on the ground that the Courts below had erred in holding that the consideration so far as the second and third defendants were concerned was unlawful. His contentions were accepted by Somayya, J., who heard the second appeal. Consequently the learned Judge decreed the suit against the second and third defendants also. The third defendant has now appealed under Cl. 15 of the Letters Patent, the learned Judge having given the necessary certificate.

S. 345 of the Code of Criminal Procedure states what offences are compoundable. Some of them are compoundable without the leave of the Court and the others can only be compounded with the sanction of the Court. The offences which are not mentioned in the section cannot be compounded under any circumstances. The offence of cheating falls within the list of offences which are compoundable with the leave of the Court. Sub-S. (7) states that no offence shall be compounded except as provided by the section. S. 213 of the Penal Code makes it a punishable

offence to accept a gratification or the restitution of property in consideration of his not proceeding against a person for the purpose of bringing him to legal punishment and S. 214 makes it an offence to "offer" a gratification in such circumstances.

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Leach, C.J.

The basis of the decision of Somayya, J., is that no criminal proceedings had been instituted. He considered that in these circumstances the parties were at liberty to compound. This is contrary to the provisions of S. 345 of the Code of Criminal Procedure which expressly prohibits the compounding of the offence of cheating without the leave of the Court. Notwithstanding that no prosecution is launched the offence remains. What the second and third defendants did was to execute a negotiable instrument in consideration of the payee undertaking not to prosecute a person who had committed a criminal offence which could not be compounded without the Court's sanction. The consideration for the note so far as the second and third defendants were concerned was manifestly unlawful and therefore the promissory note cannot be enforced against them.

It follows that the appeal will be allowed with costs throughout against the plaintiff respondent. Only the third defendant has appealed but his success means that the suit will be dismissed as against the second defendant as well.

K.C. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

M. R. M. N. Chockalingam Chettiar .. *Appellant** *(Applt.-Plff.)*

v.

The Government of Madras, represented by the District Collector of Madura .. *Respondent* *(Respt.-Deft.).*

Chockalingam Chettiar v. Government of Madras.

Sea Customs Act (VIII of 1878), Ss. 188 and 191—Smuggling of goods—Inspector of Customs holding inquiry—Collector of Customs passing order on records of evidence before him—Application for revision of order to Central Board of Revenue—Board's order confirming Collector's order for confiscation of goods—Suit in Civil Court, whether barred.

Where a person was suspected by the Customs authorities to have smuggled silk goods, and in the inquiry that ensued before the Inspector of Customs all facilities for representation of the accused's case were provided and he was heard and was represented by counsel and afterwards the records were sent to the Collector of Customs and Salt Revenue who passed an order to confiscate the goods, holding that they had been smuggled, and thereupon the appellant filed an application under S. 188 of the Sea Customs Act to the Central Board of Revenue, which on revision, held that the order of the Collector was right and could not be interfered with, on the questions whether the decision on revision was final within the meaning of S. 191 of the Act and whether the jurisdiction of Civil Courts was barred,

Held, that inasmuch as the Central Board had heard the appellant and passed judgment after hearing counsel properly, and since there was no suggestion that the principles of justice or provisions of the Act had been infringed by the Board even if the procedure before the Collector of Customs was not in accordance with the provisions of the Act or with principles of

*S.A. No. 140 of 1940. 25th March, 1942.

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natural justice, the remedy by way of application for revision to the Board of Revenue having been provided by the statute there was no right of suit open to appellant.

Secretary of State, for India v. *Jagannadham*, (1941) 2 M.L.J. 47: I.L.R. (1941) Mad. 850 at 859 (F.B.), relied on.

Appeal against the decree of the District Court of Madura in A.S. No. 153 of 1938 preferred against the decree of the Court of the Subordinate Judge of Madura in O.S. No. 50 of 1937.

K. Rajah Aiyar and *K. S. Ramamurthi* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—The appellant was the owner of certain silk goods seized by the Customs authorities at a place near Madura on 16th October, 1935. These goods were suspected by the Customs authorities to be smuggled and an inquiry was held by the Inspector of Customs, Negapatam, at which it is conceded that the appellant was heard and was represented by the advocates of the Tanjore Bar and that no facility was refused him to put forward whatever evidence he had to adduce or arguments he wished to present to the Court in support of his case. The records of the case were sent to the Collector of Customs and Salt Reveune who passed an order in January, 1936, confiscating the goods which had been seized, holding that they had been smuggled. This order was passed without any further hearing being afforded to the appellant.. The appellant thereupon applied under S. 188 of the Sea Customs Act to the Central Board of Reveune which on the 5th May, 1936, held on revision that the order of the Collector of Customs was right and could not be interfered with. This second appeal arises out of a suit by the plaintiff for a declaration that the order of the Central Board of Revenue is not valid and binding on him. Both the learned Subordinate Judge of Madura and the learned District Judge of Madura have held that there was no right of suit and this is the subject-matter of the second appeal.

S. 188 of the Sea Customs Act provides that every order passed under that section shall, subject to the power of revision conferred by S. 191, be final. It is argued for the appellant that the use of the word 'final' does not necessarily mean that in all circumstances the jurisdiction of Civil Courts is barred, and I have been referred to a recent decision of the Privy Council reported in *Secretary of State for India* v. *Mask & Co.*,[1] in which the following words occur:

> "It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

The argument is that in the present case the provisions of the Act have not been complied with and also that the fundamental prin-

1. (1940) 2 M.L.J. 140: L.R. 67 I.A. 222: I.L.R. (1940) Mad. 599 (P.C.).

ciples of judicial procedure have been violated. A very interesting argument has been developed on this question, but it seems to me that it is unnecessary for me to consider it. The argument is based upon the fact that the word 'adjudged' in S. 182 requires that the official who is adjudging confiscation must do so by a judicial order and cannot pass a final order without personally hearing the person against whom it is to be passed. Therefore in refusing to give a personal hearing to the appellant the Collector of Customs was infringing the provisions of the section. The fundamental principles of judicial procedure also include the right of the appellant to be heard and to be heard not only by a subordinate official but by the official who is to pass the order against him. In the present case there is no doubt at all that the appellant was heard, but he was heard not by the Collector of Customs but by the Inspector of Customs; nor can there be any suggestion that he was prevented in any way from adducing all the evidence which he wished to adduce and proving any fact which he wished to prove. As the learned District Judge has held, all the records of the case must be assumed to have been before the Collector of Customs when he passed his order and it cannot be said that the order was passed without the appellant having had an opportunity of putting forward his case, even though he was not present in person or by advocate before the Collector of Customs. It has been found that the written arguments that were submitted to the Inspector of Customs must have been before the Collector of Customs also. I have been referred to certain Calcutta cases dealing with S. 36 of the Legal Practitioners' Act, which I think are distinguishable from the facts of the present case, because there is a specific sub-section of that Act which requires that before any person's name is included in the list of touts, he must be given an opportunity to show cause why his name should not be included. The existence of that sub-section is a clear justification for the finding of the Calcutta High Court that before any Court can include the name of any person as a tout, that Court and not a Court subordinate to it must hear his objection to that course. There is no such provision in S. 182.

As I say, however, I do not think it necessary for me to give any finding whether the use of the word 'adjudged' in S. 182 requires that the actual official who passed the order of confiscation must hear the person whose goods are being confiscated. There is another remedy provided by the Act and that is an application to the Central Board of Revenue under S. 191. In the present case such an application was made and failed, and although all the arguments before me have been concentrated upon the failure of the Collector of Customs to observe the procedure laid down by the Act, the suit is not to set aside his order but to set aside the order of the Central Board of Revenue. Against that order no criticism at all has been put forward. The order shows that it was passed after the appellant's counsel had been duly heard and no attempt whatever has been made to suggest that in passing that order the Central Board of Revenue has in anyway infringed the principles of justice or the

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provisions of the Act. As has been laid down in a recent Full Bench decision of this Court in *Secretary of State for India* v. *Jagannadham*,[1] where by an act of Legislature powers are given to a person for a public purpose from which an individual may receive an injury, if the method of redressing the injury is indicated by the statute the ordinary jurisdiction of Civil Courts is ousted and a suit does not lie. It seems to me clear on the principles there enunciated that even if it be true that the procedure of the Collector of Customs was not in accordance with the Act or with the principles of justice, there is a definite remedy provided by the Act and because that is so the appellant had no right of suit.

In the result, this appeal must fail and is dismissed with costs.

Leave to appeal is refused.

K.C. ——— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

In the matter of Sri K. R. *Pleader, Trichinopoly.**

F.B. — Sri K.R., Pleader, Trichinopoly, *In the matter of.*

Legal Practitioners' Act (XVIII of 1879), *Ss.* 13 *and* 14—*Pleader advancing moneys to client to continue litigation in which he is engaged—Conduct improper.*

In India, a pleader, like the advocate combines the functions of the solicitor and the barrister in England and as he fulfils both roles he is subject to the disabilities of both. A pleader or an advocate should not lend money to his client at any time for the purposes of an action in which he is engaged and to do so will be improper.

This case came on for hearing after service of notice under Ss. 13 and 14 of the Legal Practitioners' Act on the Pleader abovenamed, calling upon him to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court for his grossly improper conduct in the discharge of his professional duty.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) on behalf of the Crown.

V. V. Srinivasa Aiyangar and *K. S. Desikan* for Respondent-Pleader.

K. Aravamudha Aiyangar for Complainant.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—Three charges of professional misconduct were framed against the respondent who is a pleader practising in the Trichinopoly District. The first two charges were to the effect that he financed litigation in which he had appeared in his professional capacity. The third charge was that he had filed a false fees certificate. It is obvious that there

1. (1941) 2 M.L.J. 47: I.L.R. (1941) Mad. 850 at 859 (F.B.).
*R.C. No. 9 of 1942. 13th July, 1942.

is no foundation for the third charge and no further reference to it is necessary.

The respondent filed a suit on behalf of a childless widow, one Mahamu Ammal, for declaration of her title to certain properties and for partition. The petitioner in this case was the defendant, and there can be no doubt that in instituting these proceedings against the respondent he has been actuated by malice. After the institution of the suit the respondent advanced to his client the sum of Rs. 300 on a promissory note. Out of this money the client paid to the respondent Rs. 200 for the expenses of the suit. More monies were required nine months later and the respondent advanced a further sum of Rs. 432. There was then due to him on the promissory note Rs. 318 which with the fresh advance made a total indebtedness of Rs. 750. As security for this Rs. 750 the client executed in his favour a mortgage of her interest in some of the properties in suit. The respondent made no attempt to hide what he was doing; in fact the deed of mortgage sets out the facts in full. We are satisfied that in making these advances the respondent was actuated entirely by a desire to help his client who had no one else to turn to for help. He was also satisfied with the righteousness of her case. He was justified in this view because the suit resulted in a decree in his client's favour.

The question which the Court is called upon to decide is whether in advancing the moneys to his client for the purpose of the litigation the respondent was doing something which is improper. In this country a pleader, like the advocate combines the functions of the solicitor and the barrister in England. He does the solicitor's part of the work and he pleads in Court. As he fulfils both roles he must be subject to the disabilities of both. There would be nothing improper for a solicitor in the circumstances of this case to advance moneys to his client, but it would be improper for a barrister briefed by a solicitor to do so and the higher standard must be applied. By helping his client in this way the respondent had a personal interest in the litigation; in fact an actual interest in the subject-matter of the suit. This is surely not in keeping with the standard of conduct which his profession demands of him. It would be manifestly improper for a practitioner fulfilling the two roles to advance money to a person for the purpose of the institution of a suit, and it is difficult to see what difference there can be when money is advanced for the purpose of continuing the litigation. The only safe rule to lay down is that a pleader or an advocate should not lend money to his client at any time for the purposes of an action in which he is engaged.

As we have indicated we fully accept the statement that the respondent acted in good faith and in these circumstances we do not consider that any action is called for. It will be sufficient in this case to draw attention to the rule which we have stated and leave the matter there.

K.C. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

K. S. Nageswara Aiyar .. *Appellant** (*2nd Deft.*)

v.

S. Ganesa Aiyar .. *Respondent* (*1st Deft.—Plff.*).

Nageswara Aiyar *v.* Ganesa Aiyar.

Jurisdiction—False allegation by debtor regarding his residence in petition for adjudication—Adjudication by High Court upon the false allegation—Nullity—High Court's order whether vitiated by fraud.

Where a person who was really residing in the Tanjore District falsely stated in his petition for adjudication and affidavit in the High Court that he was residing within the territorial limits of its original civil jurisdiction and the High Court ordered his adjudication on such allegation, on the question whether the High Court's order adjudicating the debtor as insolvent was a nullity,

Held, that the High Court was a Court of competent jurisdiction for this purpose and notwithstanding the fact that the debtor made a deliberately false allegation that he was resident within its jurisdiction the order of adjudication was not rendered a nullity.

Revell v. *Blake*, (1873) L.R. 8 C.P. 533, relied on.

If the question which is alleged to create the want of jurisdiction is one which the Court itself is bound to decide, the matter is not one relating to jurisdiction. It is a fact like any other fact which the Court has got to decide and if there is any error in the decision, it can only be remedied by an appeal or any other procedure known to law.

The mere fact that a false allegation was made in the petition and affidavit was no ground for holding that the order was procured by fraud or for treating it as a nullity.

Chinnayya v. *Ramanna*, (1913) 25 M.L.J. 228; I.L.R. 38 Mad. 203, applied.

Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in O.S. No. 12 of 1939.

K. V. Ramachandra Aiyar and *S. Thyagaraja Aiyar* for Appellant.

L. S. Veeraraghava Aiyar and *N. Panchapakesa Aiyar* for Respondent.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.

Krishnaswami Ayyangar, J.—This appeal arises out of an interpleader suit instituted by one S. Ramaswami Aiyar who has since been discharged from the suit by the judgment under appeal. This Ramaswami Aiyar purchased the joint family properties belonging to the respondent Ganesa Aiyar and his father Swaminatha Aiyar under a sale deed, dated 17th April, 1920, for a consideration of Rs. 23,000. Ramaswami Aiyar agreed to discharge the debts of the family to the extent of Rs. 18,000. He was allowed to retain the balance of the consideration, namely, Rs. 5,000 in view of the fact that the respondent was at the time a minor. The arrangement was that the money should be paid to the father on his furnishing security in the sum of Rs. 7,500 within one year but if he failed to do so, the money could only be claimed after the minor attained majority and executed a release deed in favour of the purchaser. This sum of Rs. 5,000 remaining in the hands of the purchaser as the unpaid balance of

*Appeal No. 129 of 1940. 24th June, 1942.

the purchase money was the subject-matter of the interpleader suit in the Court below. The learned Subordinate Judge has held that the money in Court belonged to the respondent and his father in equal shares and while giving a decree in favour of the respondent for a moiety has directed the other moiety to remain in Court till the expiry of nine months from the date of the decree so that the decree-holder in O.S. No. 121 of 1923 on the file of the District Munsif's Court, Tiruvarur, might have sufficient time to put his decree into execution, and obtain orders thereon.

Certain other facts have to be referred to in order to understand how the matter came into Court. In O.S. No. 121 of 1923 on the file of the District Munsif's Court, Tiruvarur, a creditor of the first respondent's father instituted a suit for the recovery of a certain sum of money from him. The suit was dismissed by the District Munsif but on appeal his judgment was reversed and a decree was passed in favour of the creditor for Rs. 1,389. Execution was taken out for the recovery of the money and the first respondent's father was arrested. He was released on 3rd November, 1928, on furnishing security and undertaking to obtain an order from the High Court staying the execution of the decree. He made the application for stay but it was dismissed. On 22nd November, 1928, he came to Madras and filed his own petition for being adjudicated an insolvent in this Court. The next day, namely, 23rd November, 1928, he was adjudicated. Thereafter the Official Assignee took out an application for payment to him of the unpaid purchase money remaining in the hands of the purchaser, namely, Rs. 5,000, but the application was dismissed by the order of the Court, dated 27th March, 1930, as one not properly falling within the purview of S. 7. This order was confirmed by the appellate Court on 26th February, 1932. The obvious course for the Official Assignee was to take steps to realise the money but for reasons which are not known, he chose to sell the outstanding. At the sale held by the Official Assignee the decree-holder in O.S. No. 121 of 1923 purchased the outstanding in the name of his son Ramaswami Aiyar under Ex. XI. This sale was on 20th December, 1932. Ramaswami Aiyar in his turn assigned his right to recover the money to the appellant Nageswara Aiyar on 2nd February, 1939. There were thus conflicting claims to this sum of money both by the assignee and by the respondent. The purchaser was obliged to file the interpleader suit so that the title to the money may be decided in the presence of the two contesting parties. The money was deposited in the Court below pending the suit.

Several contentions were raised in the Court below and they are covered by Issues 16 in number which have been framed by the Subordinate Judge. On one point alone the learned Subordinate Judge's finding is in favour of the respondent. That point is covered by Issue No. 5 and raised the question whether the order of adjudication made by this Court adjudging the respondent's father as an insolvent was a nullity being an order passed by a Court not competent to pass it. It may be mentioned before proceeding further that the findings on Issues Nos. 7 and 8

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Krishnaswami Ayyangar, J.

which are also in favour of the respondent are merely consequential on the finding on Issue No. 5. The other issues were all decided in favour of the appellant.

The ground on which the order of adjudication is attacked as a nullity is this: that whereas the debtor was really residing in the Tanjore District he falsely stated in his petition and affidavit in this Court that he was residing within the territorial limits of this Court's Original Civil Jurisdiction and it was by making this false statement that he induced the Court to entertain the petition and make the order of adjudication. The learned Judge has found that this allegation in the insolvency application was falsely made in order to give jurisdiction to the High Court but that on the real facts the High Court could have had no jurisdiction to entertain the insolvency petition or adjudicate the respondent's father insolvent. This finding so far as it involves a question of fact, not having been challenged, the only question for the Court to consider is whether the High Court which passed the order of adjudication was a Court not competent to pass it. A distinction has always to be made between competency or jurisdiction to make an order and the correctness of the order on the merits where the Court had the jurisdiction to decide the question. We are of opinion that the High Court was a Court of competent jurisdiction for the present purpose and notwithstanding the fact that the debtor made a deliberately false allegation that he was a resident within the jurisdiction, the order is not rendered a nullity. The question has been considered by a decision of the Exchequer Chamber in *Revell* v. *Blake*.[1] The case arose under the Bankruptcy Act, 1869 (32 and 33 Vic., c. 71). S. 59 of that Act provided that if the person sought to be adjudged a bankrupt resided or carried on business in the London Bankruptcy District, the expression 'Court' in that Act should mean the Court of Bankruptcy in London but that if the person sought to be adjudged a bankrupt did not reside or carry on business within the London Bankruptcy District, the expression should mean the County Court of the District within which he resided or carried on business. In other words, a debtor could not be adjudicated a bankrupt in the County Court even if he resided within the jurisdiction of that Court if he also resided in London or carried on business there. In the case before the Exchequer Chamber which arose out of a creditor's petition, the debtor did in point of fact carry on business within the London District but the creditor's petition contained a statement that he did not reside or carry on business there and was presented to the County Court of the District in which the debtor resided. The County Court made an order of adjudication *ex parte* in the usual form. On an appeal being filed, the Court of Exchequer Chamber held that the adjudication was not void, notwithstanding the fact that the bankrupt did in fact carry on business in London and could only be questioned at proceedings in the way of application or appeal to the Court of

1. (1873) L.R. 8 C.P. 533.

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Krishnaswami Ayyangar, J.

Bankruptcy. The ground of the decision is set out by Kelly C.B. in the following passage:

"The language of the 59th section might, at first sight, appear to make it a condition precedent to the jurisdiction of the County Court that the party petitioned against did not in fact reside or carry on business in the London District. But it appears to me impossible to hold, when a petition, perfectly good on the face of it, is presented, containing allegations that, if proved to the satisfaction of the Judge would render it imperative upon him to pronounce an adjudication, and such allegations are so proved, that the jurisdiction of the Judge should depend upon whether or not the bankrupt did actually reside or carry on business in the London district, a fact which the County Court can have no means of knowing or ascertaining. . . . Looking therefore to all the provisions of the Act, as a whole—to the fact that it is absolutely imperative on the Judge to entertain a petition which is good on the face of it, and that it is obviously necessary that he should determine for himself, to the best of his judgment, in the first instance, on the truth of the allegations of the petition, and among them, where the fact is disputed, whether a debtor carries on business in London or not, and that from a wrong decision on any such question there is a remedy provided by way of appeal—I am clearly of opinion that there was no absence of jurisdiction in this case, and the Judge was bound, if satisfied with the proof before him, to pronounce the debtor a bankrupt."

It is conceded by the respondent's learned counsel that the question whether the petitioner was residing within the jurisdiction so as to clothe the Court with jurisdiction is one which the Court was entitled to decide for itself before making the order. If the question which is alleged to create the want of jurisdiction is one which the Court itself is bound to decide, surely, the matter is not one relating to jurisdiction. It is a fact like any other fact which the Court has to decide and if there is an error in the decision, it can only be remedied by an appeal or any other procedure known to law.

It was also attempted to be argued that the order of the learned Judge can be supported on the ground that the order of adjudication is liable to be impeached on the ground that it was procured by the fraud of the debtor. We are not satisfied that this aspect of the case is sufficiently indicated in the written statement of the respondent or has been dealt with by the learned Subordinate Judge. We, however, consider it unnecessary to shut out the respondent from raising this contention. But we are constrained to observe that there is no substance in this point. We have already referred to the concession made by the learned advocate for the respondent that it was competent to the Court to decide whether the debtor was residing within the jurisdiction. If that is so, the mere fact that a false allegation was made in the petition and affidavit is no ground for holding that the order was procured by fraud or treating it as a nullity. In *Chinnayya* v. *Ramanna*,[1] a Bench of this Court consisting of Benson and Sundara Aiyar, JJ., examined the law bearing upon the point and laid down the following proposition:

"In order that fraud may be a ground for vacating a judgment, it must be a fraud that is extrinsic or collateral to everything that has been adjudicated upon but not one that has been or must be deemed to have been dealt with by the Court."

1. (1913) 25 M.L.J. 228: I.L.R. 38 Mad. 203.

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Krishnaswami Ayyangar, J.

We are clearly of opinion that the truth of the allegation about the residence of the debtor was a matter which must be deemed to have been dealt with by the order. We are therefore of opinion that the learned Judge was in error in coming to the conclusion that the order of adjudication is void, and would accordingly set aside his judgment on this point.

The result is that there will be a decree in favour of the appellant for the sum originally deposited by the plaintiff into Court less the costs decreed to the original plaintiff. The appellant is entitled to his costs of the appeal against the respondent.

The memorandum of cross-objections is not pressed and it is dismissed but without costs.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Cherukuri Gangaraju .. *Petitioner** (*1st Respt.*)

v.

Seemakurti Lakshminarayanamurti (died) and others .. *Respondents* (*Petrs.*).

Gangaraju v. Lakshminarayanamurti.

Provincial Insolvency Act (V of 1920), S. 50—Scope—Application after payment of dividend for expunging a debt from the schedule—Creditor if can be ordered to bring back the amounts paid—No other assets to be realised and no prospect of any further dividend—Enquiry into merits of application not called for in the circumstances.

A creditor to whom a dividend has been paid cannot be directed to bring back that amount merely by reason of the fact that subsequently the debt is expunged from the list of creditors.

Accordingly where an application is made after payment of a dividend for expunging under S. 50 of the Provincial Insolvency Act, the entry of a person as a creditor in the insolvency and there are no other assets to be realised by the Official Receiver and no prospect of any further dividend an enquiry into the merits of the application is wholly unnecessary.

Petition under S. 75 of Act V of 1920 praying that the High Court will be pleased to revise the order of the District Court of West Godavari, dated 8th March and made in C.M.A. No. 139 of 1937 (in I.A. No. 4 of 1937, in I.P. No. 62 of 1934 on the file of the Court of the Subordinate Judge of Ellore).

V. Rangachari for Petitioner.

B. V. Ramanarasu amicus curiae.

The Court delivered the following

JUDGMENT.—This is a revision petition filed under S. 75 of the Provincial Insolvency Act V of 1920 and the petitioner seeks to revise the order of the District Court of West Godavari dated the 8th of March, 1939, passed by him in C.M.A. No. 139 of 1937. By that order the District Judge reversed the order of the Additional Subordinate Judge of Ellore passed by him in I.A. No. 4 of 1937, in I.P. No. 62 of 1934.

I.A. No. 4 of 1937, which has given rise to this revision petition was one filed under S. 50 of Act, V of 1920, for expung-

*C.R.P. No. 1687 of 1939. 13th March, 1942.

Gangara v. Lakshmi-narayana-murti.

ing the entry of the petitioner as a creditor in the insolvency. The petitioner was admitted as a creditor and a dividend was paid to him by the Official Receiver. Subsequently I.A. No. 4 of 1937 was filed for action under S. 50 of the Act. The application was resisted mainly on the ground that there were no other assets to be realised by the Official Receiver and no prospect of any further dividend, that the Insolvency Court has no power even if it finds that a creditor's name ought to be expunged to make an order that the amount already paid to him by way of a dividend should be brought back by him and that therefore an enquiry on the merits was not called for in this case. If after an order expunging his name from the list of creditors, the Court could not follow it up by making an order directing him to bring back the amount that had already been distributed to him and there was no prospect of any future dividend, then it is clear that an enquiry on the merits would be wholly unnecessary. There were also other applications filed to expunge the names of other creditors from the list. These applications were all heard together by the Additional Subordinate Judge and he decided relying upon certain authorities to be presently referred to that the position stated above was the correct one and that therefore there was no need to take evidence on the question whether the various debts were really true debts. He therefore dismissed I.A. No. 4 of 1937 and also the other applications along with it. Appeals were filed in the District Court of West Godavari and the District Judge reversed the decision of the Subordinate Judge and remanded I.A. No. 4 of 1937 and other petitions for enquiry on the merits. The Judge took the view that the Court has got the power to require a person to whom a dividend has been distributed and whose debt is subsequently directed to be expunged from the list of creditors to bring back the money into Court. The petitioner challenges the correctness of this order and contends that both in England and in India the position is well established that a creditor to whom a dividend has been paid cannot be directed to bring back that amount merely by reason of the fact that subsequently the debt is expunged from the list of creditors. On an examination of the authorities, I think the position advanced by the petitioner is correct and that the view taken by the District Judge is wrong.

In Ex parte *Harper*: In re *Tait*,[1] *Jessel*, M.R., while holding that lapse of time is no bar to a petitioner for expunging a debt pointed out that an order expunging the debt would only operate to prevent the creditor from participating in future dividends and that he cannot be called upon to pay back what he had already received. That was a decision under R. 73 of the Bankruptcy Rules, 1870, under which a trustee in bankruptcy who has admitted a proof against the estate is entitled at any time afterwards to apply to the Court to expunge the proof, on the ground that it was originally wrongly admitted. This rule corresponds to S. 50 of the Provincial Insolvency Act. At page 541 Jessel, M.R., says this:

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1. (1882) L.R. 21 Ch.D. 537.

Gangaraju v. Lakshminarayanamurti.

"There was no limit to the time within which a proof might be expunged. In the cases which I have already mentioned the proof was expunged on the ground that its original admission had been wrong. The new rule is in accordance with the old practice. And no injustice can be done, because any dividends which have been already paid are allowed to be retained by the creditor, and the expunging affects only the right to receive future dividends".

In In re *Searle, Hoare and Company*,[1] Lawrence, J., approved of the principle that dividends paid already cannot be recovered and held that while the debt of a creditor was reduced, he is not entitled to participate in the future dividends until and unless the other creditors were paid to the extent to which he was paid. On page 327 Lawrence, J., refers to the remarks of Jessel, M.R., in the earlier case with approval and then proceeds to say this:

"The mere fact that the trustee cannot recover either payments made to a person whose proof is subsequently expunged or overpayments made to a creditor whose proof is subsequently reduced does not, in my opinion, prevent the operation of the well-known principle of equity that a beneficiary who has been overpaid is not entitled to receive any further payment out of the trust fund until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary."

Williams in his work on Bankruptcy at page 528 under R. 24 after setting out R. 24 which corresponds to S. 50 of the Provincial Insolvency Act says this:

"Under R. 73 of 1870, and the previous practice, the trustee was entitled at any time afterwards to apply to expunge a proof which he had originally wrongly admitted, and mere lapse of time was no objection, though the creditor was entitled to retain any dividend already received."

Mr. Mulla in his Law of Insolvency says on page 495:

"The creditor, however, is entitled to retain the dividends already received, the reduction affecting only the right to receive future dividends."

Page, C.J., who delivered the leading judgment in *A.K.R.M. M.C.T. Chettiar Firm* v. *S. P. Dayabhoy & Sons*,[2] says on page 708:

"For the reasons that I have given it is immaterial as between the first respondent and the appellant whether the proof by Musafer's representatives ought or ought not to be expunged because even if it was ordered that the proof ought to be expunged dividends already paid would not be affected (Ex parte *Harper*: In re *Tait*[3]).

The decision of the Bombay High Court in In re *Ramchandra Ganuji Waikar*,[4] referred to by the lower appellate Court has no application to the present case. There in ignorance of the existence of the claim of another creditor who had lodged his claim prior to the declaration of a dividend certain dividends were paid out and the question was whether the Court has got the power to compel the creditors who had received the amount to bring back enough to pay the creditor whose claim had been overlooked. The decision in Ex parte Harper: In re *Tait*[3] is not even referred to and the case itself relates to a different set of facts.

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1. (1924) L.R. 2 Ch. 325.
2. (1935) I.L.R. 13 Rang. 703.
3. (1882) L.R. 21 Ch.D. 537.
4. (1922) 104 I.C. 378.

Gangaraju v. Lakshminarayanamurti.

In *Official Assignee* v. *S. P. Dayabhoy*,[1] *Leach, J.*, (as he then was) says this on pages 236 and 237:

"The money which has been paid out to a creditor by way of dividend in insolvency proceedings is not recoverable in law. Ex parte *Harper*: In re *Tait*,[2] *A.K.R.M.M.C.T. Chettiar Firm* v. *S. P. Dayabhoy & Sons*.[3] The expunging of a proof only affects the right to receive future dividends. . . . Mr. Kalyanvalla has also relied on a decision of the Bombay High Court in In re *Ramachandra Ganuji Waikar*.[4] It was there held by Marten, J., that where creditors have been paid more than they were entitled to by way of dividend the Official Assignee is entitled to recover the excess payment on the ground of mistake under S. 72 of the Contract Act. This decision runs contrary to the decision in Ex parte *Harper*:In re *Tait*[2] and the decision in *A.K.R.M.M.C.T. Chettiar Firm* v. *S. P. Dayabhoy & Sons*[3] but it is not necessary for me to discuss it as the last mentioned case is binding on me."

The case reported in *Panna Lal* v. *Abdullah*[5] which has been referred to by the Court below decided that where a distribution was made under an order of adjudication which was later on set aside, provisions of S. 144 of the Civil Procedure Code could be applied. Where the adjudication itself was set aside later on, then the whole ground for distributing the amounts was taken away and the case would be covered directly by S. 144, Civil Procedure Code read with S. 55 of the Provincial Insolvency Act. This decision does not touch the question which calls for decision in this case. In the present case there was no question of any non-compliance with the rules. The Official Receiver acted quite properly in distributing the amounts in his hands. The District Judge has gone entirely off the track and has indulged in a good deal of criticism against the Official Receiver. For this purpose he called for the various records from the Official Receiver's office and has set out in paragraph 9 of his judgment what he considers the facts which were disclosed by those records and then says that certain irregularities committed by the Official Receiver came to light during the arguments of the appeals.. I have been taken through this record and I hold that there is absolutely no justification for any of the District Judge's remarks against the Official Receiver. The District Judge went out of his way and remarked that the Official Receiver would even be personally liable but I see no justification for that remark as well.

I reverse the decision of the lower appellate Court and restore that of the Additional Subordinate Judge with costs here and in the lower appellate Court to be paid by the first respondent. It is regrettable that the respondents did not appear but their case has not suffered as I requested Mr. B. V. Ramanarasu to help the Court and represent what could be said on their behalf.

K.S. ——— *Petition allowed.*

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1. A.I.R. 1937 Rang. 234.
2. (1882) L.R. 21 Ch.D. 537.
3. (1935) I.L.R. 13 Rang. 703.
4. (1922) 104 I.C. 378.
5. A.I.R. 1933 All. 117.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AYYANGAR

Chellathammal *alias* Ammamuthuammal and others .. *Appellants**
(*Applt. and Respts.* 5 *and* 6).

v.

Kalitheertha Pillai and others *Respondents*
(*Applt and Respts.* 5 *and* 6).

Chellathammal *v.* Kalitheertha Pillai.

Hindu Law—Adoption—Widow of coparcener—Only coparcener being insane—Consent of two nearest divided sapindas obtained—Validity of adoption—Consent withheld by others from improper motive—Whether can be ignored.

The widow of a member of a joint Hindu family can adopt a son to her deceased husband with the assent of the nearest divided sapindas when the only surviving coparcener is insane.

Veerabasavaraju v. *Balasurya Prasada Rao,* (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I.L.R. 41 Mad. 998 (P.C.); *Balasubrahmanya Pandy Thalavar* v. *Subbayya Tevar,* (1938) 1 M.L.J. 426 L.R. 65 I.A. 93: I.L.R. (1938) Mad. 551 (P.C.); *Amarendra Mansingh* v. *Sanatan Singh,* (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.) and *Bhimabai* v. *Gurunathgouda Khandappagouda,* (1932) 64 M.L.J. 34: L.R. 60 I.A. 25: I.L.R. 57 Bom. 157 (P.C.), referred to.

Vajjulu v. *Gopalakrishnamma,* (1940) 1 M.L.J. 779, explained.

Where a sapinda improperly withholds his consent it may be ignored. In such a case it is not a question of a majority assenting, but whether those dissenting, if they form the majority have dissented from improper motives. Where the majority have withheld their consent because of improper motive the consent of the others will be sufficient.

Venkatakrishnamma v. *Annapurnamma,* (1899) 10 M.L.J. 73: I.L.R. 23 Mad. 486 and *Subrahmanyam* v. *Venkamma,* (1903) 13 M.L.J. 239: I.L.R. 26 Mad. 627, relied on.

Kalitheertha Pillai v. *Chellathammal,* (1942) 1 M.L.J. 28, reversed.

Appeal under Clause 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Somayya, dated 7th November 1941 and passed in S.A. No. 409 of 1940, preferred to the High Court against the decree of the District Court of Tinnevelly in A.S. No. 159 of 1936 (O.S. No. 83 of 1934, Sub-Court, Tinnevelly).

K. R. Rangaswami Aiyangar and *S. Venkatesan* for Appellants.

R. Sundaralingam for Respondents.

The Judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The question in this appeal is one of Hindu law and there is no authority which has direct bearing upon it. The question is whether the widow of a member of a joint family can adopt a son to her deceased husband with the assent of the nearest divided sapindas when the only surviving coparcener is insane. It is well-settled law in this Presidency that a widow who has not been authorised by her husband to

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*L.P.A. No. 57 of 1941. 2nd April, 1942.

adopt a son to him cannot do so unless she has received the assent of his nearest sapindas, and that she can lawfully adopt with the assent of the remoter reversioners if the nearest reversioners improperly withhold their assent. It has never been decided whether she can go outside the family when there are no joint sapindas capable of advising her, or, if there are they refuse their assent on improper grounds.

On the 6th January, 1926, one Sethuramalingam Pillai died leaving two widows and a daughter, the first, second and third defendants respectively. Sethuramalingam Pillai was joint with his brother, Kalitheertha Pillai, the plaintiff. They were the only coparceners. In 1926 Kalitheertha Pillai became insane and remained insane until the year 1931. On the 11th December, 1930, the widows adopted the fourth defendant. The nearest sapindas of Sethuramalingam Pillai outside the family were six in number. Two of them gave their assent to the adoption, but four of them refused their assent on the ground that Kalitheertha Pillai was sane. On the 28th July, 1933, Kalitheertha Pillai instituted a suit in the Court of the Subordinate Judge of Tinnevelly in which he challenged the validity of the adoption and asked for a decree for possession of the family estate. The Subordinate Judge held that the plaintiff was insane when the adoption was made and that the widow was entitled to make the adoption with the assent of two of the sapindas, inasmuch as the other four had improperly withheld their assent. Consequently he declared that the fourth defendant was entitled to a moiety of the properties. On appeal the District Judge of Tinnevelly agreed with the Subordinate Judge. The plaintiff then appealed to this Court and the appeal was heard by Somayya, J., who held that in the case of a joint family a widow is not entitled to seek the advice of divided sapindas and therefore is not in a position to make an adoption. The learned Judge having given the requisite certificate defendants 1 to 4 have preferred this appeal under the provisions of Cl. 15 of the Letters Patent.

The learned advocate for the appellant has taken the preliminary objection that the assent of two of the six sapindas was not sufficient, but on this question Somayya, J., agreed with the judgments below and I consider that he was right in so doing. Where a sapinda improperly withholds his assent it may be ignored. It is not a question of a majority assenting, but whether those dissenting, if they form the majority have dissented from improper motives. See *Subrahmanya* v. *Venkamma*[1] and *Venkatakrishnamma* v. *Annapurnamma*.[2] The finding of the District Judge that he was insane at the time of the adoption cannot be challenged in this Court and as the four sapindas refused their assent on the basis of the untrue allegation that he was sane their refusal can only be regarded as being improper.

In arriving at the conclusion that the widow cannot go outside the joint family when she requires the assent of the

1. (1903) 13 M.L.J. 239; I.L.R. 26 Mad. 627.
2. (1899) 10 M.L.J. 73: I.L.R. 23 Mad. 486.

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sapindas, Somayya, J., relied on the observations of the Privy Council in *The Collector of Madura* v. *Mootoo Ramalinga Sethupathi*,[1] *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*,[2] *Veerabasavaraju* v. *Balasurya Prasada Rao*,[3] and the decision of this Court in *Vajjulu* v. *Gopalakrishnamma*.[4] It was in *The Collector of Madura* v. *Mootoo Ramalinga Sethupathi*,[1] that the Privy Council decided that in the Dravida Country a Hindu widow, not having her husband's permission, may, if duly authorised by his kindred, adopt a son to him. In delivering the judgment of the Board Sir James Colvile said:

"The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband, is the first to suggest itself. Where the husband's family is in the normal condition of a Hindu family—*i.e.*, undivided that question is of comparatively easy solution. In such a case the widow, under the law of all the Schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will".

Sir James Colvile then proceeded to discuss the position when the widow has taken by inheritance the separate estate of her husband, which was there the case, and observed:—

"It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive."

In subsequent cases the Privy Council indicated that the widow's motive might not be a factor and in *Kanakaratnam* v. *Narasimha Rao*,[5] a Full Bench of this Court held that the widow's motive was not material. The necessity of obtaining the assent of the sapindas however remains.

One of the questions discussed in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*,[2] was whether an adoption by a widow was lawful when she had not received the assent of her husband's undivided brother, but had received that of a more remote relative who was separate in estate. The Privy Council held that such consent was not sufficient and their Lordships observed:

"There seem to be strong reasons against the conclusion that, for such a purpose as that now under consideration, she can at her will travel out of that undivided family, and obtain the authorisation required from a separated and remote kinsmen of her husband".

1. (1868) 12 M.I.A. 397.
2. (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.).
3. (1918) 36 M.L.J. 40: 45 I.A. 265: I.L.R. 41 Mad. 998 (P.C.).
4. (1940) 1 M.L.J. 779.
5. (1941) 2 M.L.J. 803: I.L.R. 1942 Mad. 173.

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This decision is direct authority for the proposition that a widow cannot ignore an undivided sapinda but it does not decide whether she can seek the assent of the divided kinsmen when there is an undivided sapinda alive but so mentally afflicted as to be incapable of advising her.

In *Veerabasavaraju* v. *Balasurya Prasada Rao*,[1] the Privy Council again stated that the requisite authority in the case of an undivided family is to be sought by the widow within that family and that she cannot at her will travel outside and obtain the authorisation required from separated and remote kinsmen of her husband. In that case all the undivided sapindas were dead and the widow did not seek the consent of the nearest separated sapindas. The fact that she ignored them was sufficient ground for holding the adoption to be invalid.

While recognising that in the cases to which reference has been made the Judicial Committee was not called upon to decide the question now before the Court, Somayya, J., has read, *Vajjulu* v. *Gopalakrishnamma*,[2] as being directly in point, but we do not share that opinion. The Bench which decided that case was composed of my learned brother Krishnaswami Ayyangar and myself. There the appellant as the nearest sapinda challenged the adoption made by a widow nearly 61 years after the death of her husband. The widow claimed authority to adopt under a will and also averred that the appellant and other sapindas had given their consent. The Subordinate Judge held that the will was a forgery, that the appellant was the only living sapinda and that he had not given his consent. The Subordinate Judge dismissed the suit, however, on the ground that the appellant had refused his consent from an improper motive. The appellant had not been asked why he had refused his consent and there was nothing in the evidence which indicated that he had refused it improperly. The Subordinate Judge assumed that the appellant had refused his consent on the ground that his rights as a reversioner would come to an end if the widow adopted a son to her husband and he considered that this would be an improper motive. My learned brother and I held that the Subordinate Judge was not entitled to make this assumption, that the burden was on the respondents to prove improper motive and that as the burden had not been discharged the appellant was entitled to succeed. The Court was not considering the question whether the widow could look to divided sapindas for advice when there was an undivided sapinda alive and he had improperly withheld his consent, although it was recognised that in view of the decision of the Judicial Committee in *Balasubrahmanya Pandia Thalavar* v. *Subbayya Tevar*,[3] that there was no residuary power in the widow to adopt when there was no sapinda alive.

1. (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I.L.R. 41 Mad. 998 (P.C.).
2. (1940) 1 M.L.J. 779.
3. (1938) 1 M.L.J. 426: L.R. 65 I.A. 93: I.L.R. (1938) Mad. 551 (P.C.).

Chellathammal v. Kalitheertha Pillai. —— Leach, C.J.

The Hindu law regards the adoption by a widow of a son to her deceased husband as a meritorious act. In *Amarendra Mansingh* v. *Sanatan Singh*,[1] the Privy Council referred to the well-established doctrine of the religious efficacy of sonship and their Lordships said that great caution should be observed in shutting the door upon any authorised adoption by the widow of a sonless man. As I had occasion to point out in *Seshamma* v. *Venkata Narasimha Rao*,[2] the Judicial Committee in *Amarendra Mansingh* v. *Sanatan Singh*,[1] recognised the importance of an adoption from a spiritual point of view and indicated that the matter of succession to property is a secondary consideration. It is true in *The Collector of Madura* v. *Mootoo Ramalinga Sethupathi*,[3] Sir James Colvile considered it would be unjust to allow the widow to defeat the interests of undivided brothers by introducing a new coparcener, but assuming that, in spite of what was said in *Amarendra Mansingh* v. *Sanatan Singh*,[1] property considerations are paramount in the case of an undivided family—it is not necessary to decide that question here because there was no undivided sapinda capable of assenting—is the widow of a coparcener to be precluded from seeking the advice of divided sapindas when she wishes to adopt a son to her deceased husband and there is no undivided sapinda capable of advising her? I can see no valid reason for a negative answer to this question. The religious significance of the act of adoption is fully recognised by her personal law and it seems to me that the principle which applies in the case of the divided family can with equal justice be applied here. In *Bhimabai* v. *Gurunathgouda Khandappagouda*,[4] the Privy Council held that in the Bombay Presidency a Hindu widow can make a valid adoption, although her husband died undivided and she has not obtained the consent of his surviving coparceners. The Hindu law as administered in the Bombay Presidency has always given greater latitude to the widow in this respect than the law as administered in the Madras Presidency gives her, and the position in the two provinces is not the same, but the decision of the Judicial Committee in *Bhimabai* v. *Gurunathgouda Khandappagouda*,[4] provides another indication that property is not the deciding factor in the situation.

I would allow the appeal and restore the decree of the Subordinate Judge with costs here and in the second appeal.

Krishnaswami Ayyangar, J.

Krishnaswami Ayyangar, J.—I agree.

B. V. V. —— *Appeal allowed.*

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1. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
2. (1940) 1 M.L.J. 400: I.L.R. (1940) Mad. 454 (F.B.).
3. (1868) 12 M.I.A. 397.
4. (1932) 64 M.L.J. 34: L.R. 60 I.A. 25: I.L.R. 57 Bom. 157 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Yerranki Papayya Sastri and another .. *Petitioners**

v.

Kola Appa Rao and another .. *Respondents.*

Yerranki Papayya Sastri *v.* Kola Appa Rao.

Madras Agriculturists' Relief Act (IV of 1938), S. 15—Arrears of rent—Post settlement inam—Rent paid to landholder—Stipulation for enhanced rent—Ascertainment of proper rent—Madras Estates Land Act (I of 1908)—Principles governing rent.

Where the documents filed showed that the land was granted by the zamindar to a certain person in the year 1811, that the grant was a sarva inam not subject to jodi, and was in the enjoyment of the grantee at the time of the inam settlement,

Held, that on those facts the Court could assume that the grant was a grant of *melwaram* so as to make the grantee a landholder under the Madras Estates Land Act and a tenant paying rent to him could apply under S. 15 of Madras Act IV of 1938 to have the claim for arrears of rent scaled down.

A contract for an unlawful enhancement of rent cannot be enforced by means of a suit for rent under the Madras Estates Land Act. It is equally impossible for a landholder in proceedings under S. 15 of Madras Act IV of 1938 to insist on the ryot depositing rent at a rate which represents an unlawful enhancement. And a Court dealing with a deposit under S. 15 must necessarily find out what is the correct rate of rent in accordance with the principles of the Madras Estates Land Act.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Sub-Collector of Narasapatam, dated 21st November, 1939, and made in M.P. No. 6 of 1938.

B. Jagannadha Das and *C. V. Dikshitulu* for Petitioners.

P. Satyanarayana Raju for Respondents.

The Court delivered the following

JUDGMENT.—This matter arises out of an application under S. 15 (4) of the Madras Agriculturists' Relief Act (IV of 1938) praying for the cancellation of arrears of rent on the deposit of the rent for faslis 1346 and 1347 at the rate of Rs. 300 per annum. The deposit was accepted and in revision it is contended firstly that the lower Court was wrong in assuming that the applicant was a tenant paying rent to a landholder under the Madras Estates Land Act so as to come within the terms of S. 15 of Act IV of 1938, and secondly that the lower Court was wrong in finding that the proper rate of rent was Rs. 300 per annum. The argument on the first point rests on the tenure of the land. The documents filed show that the land was granted by the zamindar to the present petitioners in the year 1811, that the grant was a "sarva inam" not subject to jodi and was in the enjoyment of the grantee at the time of the inam settlement. It is contended that on these facts the lower Court was not entitled to assume that the grant was a grant of *melwaram* so as to make the grantee a landholder within the definition in the Madras Estates Land Act. The contention is that a grant in inam might be a grant of the *kudiwaram* alone, in which case the tenant under the inamdar would not be a ryot paying rent to a land-

*C.R.P. No. 896 of 1940. 12th February, 1942.

Yerranki Papayya Sastri v. Kola Appa Rao.

holder but a mere sub-tenant paying rent to a ryot without occupancy right. No doubt the word "inam" is used with considerable differences in its precise connotation; but it certainly implies as a rule a grant free of rent or on a favourable rate of rent. My attention has not been drawn to any case in which a mere grant of the *kudiwaram* right has been described as an inam. There are of course very many cases in which there has been a question whether an inam grant was a grant of the *melwaram* alone or a grant of both *warams*. But it seems to me that if the grant were a grant of the *kudiwaram* alone, it would not be described or treated as an inam, but as a permanent lease or an ordinary ryotwari assignment.

On the proved facts of the present case it seems to me quite clear that the *melwaram* must have been granted to the inamdar, for the grant was expressly free of jodi. It was not subject to any demand of the zamindar. From this fact it seems to me to follow necessarily that when the zamindar made this grant, he divested himself of the right to collect the rent; that is to say, he divested himself of the *melwaram*. The grant being clearly a post settlement grant, the grantee must be deemed to be a landholder under the Madras Estates Land Act, having regard to the definition in S. 3 (5) of that Act as including a person owning a part of an estate or a person entitled to collect the rents of a portion of an estate by virtue of a transfer from the owner or his predecessor-in-title.

The argument with reference to the rate of rent is briefly this. For some years past the tenant had been holding the land under a series of *kadapas*, of which those relating to the years 1923 to 1931 have been put in evidence, stipulating for a rent of Rs. 620. S. 52 (3) of the Madras Estates Land Act provides that pattas and muchilikas accepted or exchanged shall remain in force till the commencement of the revenue year for which fresh pattas and muchilikas are accepted, exchanged or decreed. The argument is that when once a patta for a particular rate has been accepted, it is not competent for the tenant to plead in bar of any proceedings for the recovery of the rent that the rate of rent stipulated in the patta is not the correct rate. No authority has been propounded in support of this view which seems to me to run contrary to the principles of the Madras Estates Land Act and contrary to many reported decisions. S. 24 of the Act lays down the basic principle that the rent of a ryot shall not be enhanced except as provided by the Act, Ss. 27 and 28 lay down presumptions that the prevailing rate of rent is the correct rate of rent until the contrary is shown. These sections would be meaningless if it were possible for a landholder by getting a muchilika for an enhancement from the ryot to bind the ryot to that enhanced rate until the landholder has been forced to agree to a fresh patta. The argument that S. 52 (3) will have no effect if the tenant is entitled in a suit for rent to repudiate the patta which he has accepted, seems to me to have little force. The effect of S. 52 (3) is to enable the landholder to rely on a previously accepted patta for the purpose of instituting summary proceedings, even when there has been no actual

exchange of patta and muchilika for the current year. It is certainly open to a ryot who has accepted a patta to file a suit under S. 112 of the Act contesting the legality of the sale for rent as stipulated in the patta on the ground that it represents an enhancement. Vide *Raghunatha Desikachariar* v. *Rangaswami Pillai*.[1] And I have held in a case somewhat similar to the present that when an inamdar holding the *melwaram* right in a portion of a permanently settled estate, sues his tenant under S. 77 of the Estates Land Act for rent on the basis of a *kadapa* which represents an unlawful enhancement, the Court is obliged to give a decree for rent, not on the basis of the unlawful contract, but on the basis of the proper rent determined according to the principles laid down in the Act (Vide *Ramayya* v. *Satyanarayana Jagapathi Raju*[2]). A contract for an unlawful enhancement cannot be enforced by means of a suit for rent under the Madras Estates Land Act. Equally it seems to me, must it be impossible for a landholder in proceedings under S. 15 of Act IV of 1938 to insist on the ryot depositing rent at a rate which represents an unlawful enhancement. The Court dealing with a deposit under S. 15 must necessarily find out what is the correct rate of rent and in deciding what is the correct rate of rent, it must be governed by the principles laid down in the Madras Estates Land Act.

Yerranki Papayya Sastri v. Kola Appa Rao.

On the facts it seems to me that the materials were sufficient to support the decision of the learned Sub-Collector. There is no evidence that the rate of rent of Rs. 620 prevailed before 1923. On the other hand the tenant has produced a *kadapa* of 1881 showing a rate of Rs. 200, another of 1883 showing a rate of Rs. 250 and another of 1894 showing a rate of Rs. 290. He has produced receipts for 1898 showing a rate of Rs. 290 and for 1906 and 1907 a rate of Rs. 300. Ex. D is a letter of 1922 by the tenant protesting against the rate of Rs. 450, which was then successfully demanded. These materials seem to make it clear that when the Madras Estates Land Act came into force in 1908 the prevailing rate of rent was Rs. 300 and that since that date a steady process of illegal enhancement has been going on. In this view I agree with the decision of the lower Court and dismiss the civil revision petition with costs.

B.V.V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

Rm. N. L. Kr. Ramanathan Chettiar .. *Appellant** (*1st Defendant*)

v.

Unnamalai Achi and another .. *Respondents* (*Plff. & 2nd Deft.*).

Transfer of Property Act (IV of 1882), Ss. 2 (d), 5 and 53—Court sale—Fraud practised in filing suit and in purchasing—Suit to set aside sale—Maintainability—Principle of S. 54—Whether applicable.

Ramanathan Chettiar v. Unnamalai Achi.

1. (1932) 63 M.L.J. 575: I.L.R. 56 Mad. 300.
2. (1939) M.W.N. 903.

*S.A. No. 517 of 1940. 18th March, 1942.

Ramanathan Chettiar *v.* Unnamalai Achi.

Ss. 2 (*d*) and 5 of the Transfer of Property Act prevent S. 53 of the Act operating in the case of a transfer under an order or decree of Court. But where a person obtains a transfer of property under an order of Court as the result of a gross fraud by collusively instituting a suit and obtaining a decree and purchasing property in execution thereof, the Court can remedy the injustice by applying the principle of S. 53 of the Transfer of Property Act and set aside the transfer.

Kerr on Fraud and Mistake, 6th Ed., p. 424; *The Queen* v. *Saddlers' Company,* (1863) 10 H.L.C. 404 at 431: 138 R.R. 217 at 234: 11 E.R. 1083: 32 L.J.Q.B. 337 and *Abdul Hye* v. *Mir Mohammad Mozaffar Hossein,* (1883) L.R. 11 I.A. 10; I.L.R. 10 Cal. 616 (P.C.), relied on,

Appeal against the decree of the Court of the Subordinate Judge of Devakottai in A.S. No. 87 of 1938, preferred against the decree of the Court of the District Munsif of Devakottai in O.S. No. 153 of 1937.

V. Ramaswami Aiyar for Appellant.

T. K. Sundararaman for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal discloses a case of gross fraud and a fraud practised on the Court. The appellant was a party to this fraud and seeks to retain the benefit of his fraudulent conduct on a technical plea, but it is a source of satisfaction that this technical plea avails him of nothing.

The first respondent instituted a suit (O.S. No. 56 of 1934) in the Court of the Subordinate Judge of Devakottai to recover moneys said to have been deposited by her with a money-lending firm carried on by the second respondent's father at Pyabwe in Burma. The second respondent contested the claims and said that he was only an agent and not a partner in the firm. On the 23rd January, 1935, the Court granted the first respondent a decree for Rs. 5,318-13-9, limited so far as the second respondent was concerned to his share in the family estate, as there was no proof that he was a partner. On the 24th July, 1935, the first respondent commenced proceedings in execution and these proceedings were still pending on the 31st July, 1936. On the 1st April, 1936, the appellant filed a suit in the Court of the District Munsif of Devakottai to recover from the second respondent a sum of Rs. 1,000 and interest which he claimed to be due on a promissory note executed by the second respondent in his favour. On the 28th April, 1936, he obtained a decree and in execution thereof he attached a house belonging to the second respondent. This house was already under attachment in the execution proceedings instituted by the first respondent to enforce payment of the decree which she had obtained against the second respondent. On the 27th July, 1936, the house was sold in the execution proceedings instituted by the appellant and bought by him for the sum of Rs. 1,811. The amount of the decree was only Rs. 1,221-2-0 and the balance of the Rs. 1,811 was paid out to the second respondent.

Thereupon the first respondent filed in the Court of the District Munsif of Devakottai the suit out of which this appeal arises for (*i*) a declaration that the suit instituted by the appellant was fraudulent and collusive, its object being to defeat the attachment which she had effected in execution of the decree

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obtained by her in O.S. No. 56 of 1934, and (*ii*) a decree setting aside the sale to the appellant. The plaint did not purport to be filed under the provisions of S. 53 of the Transfer of Property Act, but the first respondent sought and obtained leave of the Court to bring the suit on behalf of all the creditors. The District Munsif held that the appellant's suit had been filed for the purpose alleged by the first respondent and that both the appellant and the second respondent were parties to the fraud. Accordingly he granted the declaration asked for and set aside the sale. The appellant appealed to the Subordinate Judge who agreed with the District Munsif. The appellant has now appealed to this Court. In the first place he contends that there was no evidence on which the Subordinate Judge could find that he and the second respondent were guilty of fraud. In the second place he says that the suit must be treated as having been filed under the provisions of S. 53 of the Transfer of Property Act and that section does not apply to a transfer made under an order of Court.

There was ample evidence on the record to justify the finding that the appellant and the second respondent, who are related by marriage, were parties to a gross fraud on the first respondent, and incidentally on the Court. There being evidence to support the finding of the Subordinate Judge, his decision is conclusive on the point. This was not seriously challenged. The appellant really relies on the plea founded on S. 53 of the Transfer of Property Act.

S. 2 (*d*) of that Act says that nothing contained in it shall be deemed to affect, save as provided by S. 57 and Chapter IV, a transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction. S. 5 says that in the sections which follow it the expression 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons. As the transfer of the property to the appellant was made by an order of the Court, his learned advocate says that these sections operate to prevent the first respondent from filing a suit under S. 53. This is no doubt the case. Mr. Bhashyam Aiyangar on behalf of the first respondent has in fact agreed that Ss. 2 (*d*) and 5 prevent S. 53 operating in the case of a transfer under an order or decree of Court. Moreover the preamble says that the Act only relates to the transfer of property by act of parties. But this does not mean that a creditor in the position of the first respondent is without a remedy.

In the course of his argument Mr. Bhashyam Aiyangar quoted the following passage from Kerr on "Fraud and Mistake" (6th edn., page 424):

"A judgment or decree obtained by fraud upon a Court binds no such Court or any other and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding. *Shedden* v. *Patrick*,[1] *The Queen* v. *Saddlers' Company*.[2] 'Fraud' said De Grey, C.J.,

1. 1 Macq. 535: 149 R.R. 55.
2. (1863) 10 H.L.C. 404 at 431: 138 R.R. 217 at 234: 11 E.R. 1083; 32 L.J.Q.B. 337.

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'is an intrinsic, collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical and temporal' *Rex* v. *Duchess of Kingston*.[1] In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud. *Shedden* v. *Patrick*.[2]

In *The Queen* v. *Saddlers' Company*,[3] one of the authorities on which the learned author relies for the above statement, Willes, J., said:

"a judgment or decree obtained by fraud upon a Court binds not such Court, nor any other; and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding, *Philipson* v. *The Earl of Egremont*,[4] *Lord Bandon* v. *Becher*[5] and *Shedden* v. *Shedden*.[2]"

A decision which is very much in point is that given in *Abdul Hye* v. *Mir Mohammad Mozaffar Hossein*,[6] where the question was whether a deed of gift was fraudulent and void as against creditors. At the time the Transfer of Property Act had not come into force, but nevertheless the Privy Council affirmed the decree which had been passed setting aside the transaction. In the course of the judgment in that case, Lord Fitzgerald said:

"By statute 13 Eliz., c. 5, all covinous conveyances, gifts, and alienations of lands or goods whereby creditors might be in anywise disturbed, hindered, delayed, or defrauded of their just rights, are declared utterly void.

Whether or not that statute (which may not extend to or operate in the mofussil in India) is more than declaratory of the common law, so far as it avoids transactions intended to defraud creditors, there seems to be no doubt that its principles and the principles of the common law for avoiding fraudulent conveyances have been given effect to by the High Courts of India, and have properly guided their decisions in administering law according to equity and good conscience."

These observations have full force here, and the principle which underlies them was applied by a Full Bench of this Court in *Rangiah Chetty* v. *Vajravelu Mudaliar*.[7] It was there held that though by reason of S. 2 (*d*) of the Transfer of Property Act, the Act does not apply to sales in execution, yet the principle of S. 36 of the Act which embodies a rule of justice, equity and good conscience can be applied and rent apportioned from day to day as between a lessor and the transferee of his right in execution in the course of a year of the lease.

What the appellant in effect says is that where a person has obtained a transfer of property under an order of the Court as the result of a gross fraud, the Court is powerless to remedy the injustice caused unless S. 53 of the Transfer of Property Act can

1. 20 How. St. Tr. 544: 2 Smith, L.C. 687.
2. 1 Macq. 535: 149 R.R. 55.
3. (1863) 10 H.L.C. 404 at 431: 138 R.R. 217 at 234: 11 E.R. 1083: 32 L.J.Q.B. 337.
4. (1844) 115 E.R. 220: 6 Q.B. 587.
5. (1835) 3 Clark & Fin. 479.
6. (1883) L.R. 11 I.A. 10; I.L.R. 10 Cal. 616 (P.C.).
7. (1917) 33 M.L.J. 618: I.L.R. 41 Mad. 370.

be invoked. To follow this argument to its logical conclusion means that all a debtor has to do in order to defeat his creditors is to induce some equally fraudulently minded person to bring a false suit against him, say on a promissory note, obtain a decree and attach and buy in the defendant's property at the Court auction. The Court certainly has full power to remedy such an injustice and the Courts below have applied the proper remedy. It is indeed regrettable that the appellant, having been found guilty of fraud against the first respondent, should have persisted in this appeal. The finding of the Subordinate Judge that he was a party to the gross fraud was conclusive, but it may be added that we agree with his finding.

The appeal will be dismissed with costs in favour of the first respondent.

B. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Ramachandru Rao, Municipal Health Officer, Vaniambadi .. *Petitioner* (Accused)*

v.

Chinnayya Goundan .. .. *Respondent (Complainant).*

Criminal Procedure Code (V of 1898), S. 197—Person exceeding his duty as public servant and striking complainant—Sanction of Local Government—Necessity for before filing complaint.

A Municipal Health Officer purporting to act in the discharge of his duties objected to the tying of some cows to a particular tree by the complainant. While doing so he was alleged to have given some smacks to the complainant. In respect of a complaint filed against the Health Officer,

Held, As the accused was acting as a public servant when he interfered with the complainant and struck him the sanction of the Local Government was necessary before the complaint could be filed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Second Class Magistrate of Vaniambadi, dated 7th April, 1941 and made in C.C. No. 130 of 1941.

J. Krishnamurthi for Petitioner.

Respondent not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—One Chinnayya Goundan filed a complaint in the Court of the Second Class Magistrate of Vaniambadi to the effect that the Municipal Health Officer came to him after the complainant had tied a cow to a tree, gave him a smack on the neck, and told him that he had no business to tie his cow there. He said to the Health Officer that if he had been told that he should not tie his cow there, he would not have done so. The Health Officer thereupon lost his temper and gave him some further blows on the cheeks and on the head. The Health Officer raised

*Cr.R.C. No. 399 of 1941. 31st October, 1941.
(Cr.R.P. No. 378 of 1941).

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a preliminary objection that the Magistrate could not entertain this complaint in the absence of the sanction of the Local Government. The Magistrate, in a considered order, held that the act of the Health Officer could not be said to be one that was done by the petitioner in the exercise of his official duty, and so dismissed the application.

It is of course true that it was no part of the duty of the petitioner to strike the complainant on his neck and face; but the question is whether, in the words of S. 197 of the Code of Criminal Procedure, the Health Officer purported to act in the discharge of his official duty. It was not the case of the complainant that the Health Officer bore any personal animosity against him; it was because the complainant had done something which the Health Officer thought he ought not to have done, that the Health Officer interfered; although if the complainant's story is true, he exceeded his duty. It is of course no part of the duty of any person to commit an offence; but it is clear that S. 197, Criminal Procedure Code is intended to protect public servants from frivolous complaints made while they are doing their duty as public servants. The petitioner was undoubtedly acting as a public servant when he interfered with the complainant and struck him. I therefore find that the sanction of the Local Government was necessary before this complaint could be filed.

The petition is therefore allowed, the proceedings in the Sub-Magistrate's Court are set aside and the Sub-Magistrate is ordered to return the complaint to the complainant. It is of course open to the complainant to re-present the complaint after he has obtained sanction.

K. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

Sait Parasuram Byas .. *Appellant** (*Petitioner*)

v.

The Sub-Collector, Rajahmundry and another .. *Respondents* (*Respondent and Referring Officer*).

Sait Parasuram Byas v. The Sub-Collector, Rajahmundry.

Land Acquisition Act (I of 1894), Ss. 4 and 23—Lessee of land having prospect of being granted ryotwari tenure at the end of the lease—Acquisition of interest—Principle of assessment of market value.

Where at the time of the issue of the notification under S. 4 of the Land Acquisition Act, a person had a lessee's interest in the land concerned together with the prospect of having the land converted into a ryotwari tenure at the end of the lease and there was no reason to believe that Government would not grant to the lessee ryotwari tenure at the end of his period or during it if he applied, for purpose of assessing compensation, the market value of the interest should be based on all the rights which the lessee had and on his potential rights. If the holding of the land under a ryotwari tenure had a value that value would increase the market

*Appeal No. 144 of 1940. 26th March, 1942.

price of the lessee's interest and that factor must accordingly be considered in fixing the value of the lessee's interest in the land.

Sait Parasuram Byas v. The Sub-Collecter, Rajahmundry.

Appeal against the decree of the District Court of East Godavari at Rajahmundry, dated 23rd February, 1939 and passed in O.P. Nos. 26 and 32 of 1937.

V. Govindarajachari for Appellant.

D. A. Krishna Variyar for the Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises an interesting question with regard to the market price of certain land in the town of Rajahmundry acquired by the Government in proceedings instituted under the Land Acquisition Act. When the notification was issued under S. 4 of the Act on the 25th January, 1937, the appellant and the second respondent appeared as claimants to the land. The question of the respective interests of the appellant and the second repondent has not yet been decided, but the appeal can proceed on the footing that the appellant is entitled to the amount awarded in the proceedings. The District Judge of East Godavari has found that on the date of acquisition the market value of the land which measured 11,541 square feet was Rs. 1,676-13-0, to which was to be added the solatium of 15 per cent. A lease of the land for a term of 99 years was granted to Arbuthnot and Company by the East India Company on the 4th July, 1848 and therefore the term expires on the 3rd July, 1947. The appellant claims to be the successors in title of Arbuthnot and Company. The figure of Rs. 1,676-13-0 represents the freehold value of the land but the District Judge held that the lessee was only entitled to one-eighth of that value, relying on a statement in the Land Acquisition Manual published by the Government of Madras. The appellant does not claim to be entitled to compensation on the basis of full ownership, but he says that under an order of the Government issued on the 28th October, 1898, he would, if the land had not been acquired, be entitled at the expiry of the lease to hold the land on ryotwari tenure and the fact that there existed this right added to the market value of his interest in the property as the lessee on the date of notification.

The order of the Government of Madras, dated the 28th October, 1898, on which the appellant relies, cancelled the orders of the Government previously issued under which leases for 99 years could be converted into permanent holdings with a fixed assessment. The order directed that such leases would be dealt with in future in accordance with the following:

"(1) Where the lease has actually expired and the land has legally reverted to the Government, ordinary ryotwari pattas will be issued, the lands being classed as dry or wet in accordance with ordinary settlement principles.

(2) Where the lease is still running, the leaseholder will ordinarily be given the option of taking an ordinary ryotwari patta subject to periodical revision. If, however, the rent reserved under the lease is higher than the settlement rates, the lease should be allowed to run to its term, a ryotwari patta reserving for the unexpired term an assessment equal to the rent reserved under the lease.

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(3) Where the leased lands are in towns, the rates prescribed for the assessment of town sites should be applied instead of rates calculated in the ordinary settlement principles."

Mr. Govindarajachari contends that the appellant is much in the same position as a lessee whose lease gives to him the right to a renewal, and in this connection he has referred to the decision in *Bogg* v. *Midland Railway Company*,[1] Mr. Govindarajachari is putting his case too high when he says that the order of the Government of the 28th October, 1898, gives him a right to hold the land under the ryotwari tenure. The order does not go to this extent, but it indicates that Government will ordinarily convert such leaseholds into ryotwari tenure and regard the lessee as being entitled to a patta. Although this does not amount to an absolute right, the fact that this is the course which Government ordinarily takes would tend to increase the value of the lessee's interest. S. 23 of the Land Acquisition Act provides that the market value to be taken is the market value on the date of the notification, which means the market price ruling immediately before the publication of the notification. Therefore the market price of the appellant's interest in the land acquired was his lessee's interest, plus the added value arising from the prospect of having the land converted into a ryotwari tenure at the end of the lease.

Mr. D. A. Krishna Variyar, who has appeared on behalf of Government, has suggested that the lessee's right to compensation could not be anything more than that based on the unexpired portion of the lease, because the Government having decided to acquire the land would not be prepared to follow the course laid down in its own order of the 28th October, 1898. But this argument overlooks the fact that all that the Court is concerned with is what the value of the lessee's interest was in the market when the notification appeared and the market value must be based on all the rights which the lessee had and on his potential rights.

In *Vallabhdas Naranji* v. *The Collector*,[2] the Privy Council held that the value of the land which in itself was worthless, but had a potential use for salt works was the market value of the potentiality. Anticipating the argument that there was not an absolute right in the appellant to have the lease converted into ryotwari tenure, Mr. Govindarajachari referred to the case of *Holt* v. *Gas Light and Coke Company*.[3] There a volunteer corps obtained land on lease for the purpose of using it as a rifle range. There were three blocks. The land at both ends was held by the corps under lease; but the intermediate land was held under a licence which could be terminated at any time. The respondent company acquired the land at one end and the question was what was the principle on which compensation should be awarded. It was suggested on behalf of the respondent company that as the intervening land was held merely under a licence which depended on the will of the owner, the acquisition

1. (1867) L.R. 4 Eq. Cas. 310.
2. (1929) 56 M.L.J. 750 (P.C.).
3. (1872) L.R. 7 Q.B. 728.

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of the adjoining portion meant no loss in respect of the land held under licence. In this connection Cockburn, C.J., said:—

"What matters it that between the two there intervenes a piece of land which does not belong to the parties claiming compensation, except this, that, inasmuch as their right to use that land as part of the range depended on the will or licence obtained from the owner of the land, it was precarious. But inasmuch as there was no reason to suppose he would alter his will in respect of it and change his mind, and give them notice that the licence or permission given should be withdrawn, I see no reason why the jury should not, looking at the whole state of things, come to the conclusion that substantially this was not of so precarious a tenure but that they might infer that the existing state of things would not be altered; and that that which had been used before as an entire rifle range would have been so continued, and, consequently, that the land had a value which it would not have lost but for the intervention and act of the company; and, therefore, there should be some compensation for this loss."

Before the land acquisition proceedings were instituted here, there was no reason to believe that Government would not grant to the lessee ryotwari tenure at the end of his period or during it if he applied, and if the holding of the land under the ryotwari tenure had a value, that value increased the market price of the lessee's interest. The District Judge has not taken into consideration this factor and the case will be remanded to him to decide in the light of this judgment what the value of the lessee's interest in this land really is. The parties will be at liberty to adduce fresh evidence should they so desire.

The appellant is entitled to costs, but we do not think he should be given full costs because he has stamped his memorandum of appeal on the basis that he is entitled to the full Rs. 1,676-13-0. An order for half the usual costs will meet the case. The court-fee will be refunded.

K. C. ——— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Bobba Kutumbayya and others ... *Petitioners** *(Accused)*

v.

Ketavarapu Lakshminarasimha Rao .. *Respondent* *(Complainant).*

Kutumbayya v. Lakshminarasimha Rao.

Criminal Procedure Code (V of 1898), Ss. 247 and 403—Accused charged under S. 447, Indian Penal Code—Acquittal under S. 247, Criminal Procedure Code, as complainant was absent—Further trial—Barred under S. 403, Criminal Procedure Code.

A person was charged under S. 447, Indian Penal Code and at the third or fourth adjournment as the complainant was absent the Magistrate acquitted the accused under S. 247 of the Criminal Procedure Code. The complainant's telegram asking for an adjournment reached the Magistrate five minutes after the order of acquittal was pronounced. The Magistrate's successor in office thereupon permitted the complainant to file a fresh complaint and took cognizance of the case on the new complaint. On revision,

Held: As the trial in a summons case commences with the issue of notice to the accused, the accused was both tried and acquitted on the first complaint and therefore S. 403 of the Criminal Procedure Code would operate as a bar to a further trial. Further such a second trial would in

*Cr.R.C. No. 989 of 1941. 8th November, 1941.
(Cr.R.P. No. 934 of 1941).

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effect amount to reviewing the order of his predecessor by the succeeding Magistrate which he has no jurisdiction to do.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Stationary Sub-Magistrate of Gannavaram, dated 28th October, 1941 and made in C.C. No. 822 of 1941.

D. Munikanniah for Petitioners.

Respondent not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner was charged before the Stationary Sub-Magistrate of Gannavaram under S. 447, Indian Penal Code. At the third or fourth adjournment the complainant was absent; and so the Magistrate acquitted the accused under S. 247, Criminal Procedure Code. The complainant had sent a telegram asking the Magistrate to adjourn the case which reached the Magistrate five minutes after the order of acquittal was pronounced. The successor of the Magistrate who acquitted the accused thereupon permitted the complainant to file a fresh complaint and took cognizance of the case on the new complaint. The accused has filed this petition, contending that the Magistrate had no jurisdiction to entertain the second complaint; for the accused had been acquitted and his second trial was barred by S. 403, Criminal Procedure Code.

As the trial in a summons case commences with the issue of notice to the accused, it is clear that the accused was both tried and acquitted, and that therefore S. 403 would operate as a bar to a further trial. The Magistrate purported to follow Cr.R.C. No. 867 of 1916, in which a Bench of this Court held that an acquittal under S. 247 was not a bar to a fresh trial. That case has never been followed by this Court. It was considered and differed from In re *Dudekula Lal Sahib*,[1] which has been followed consistently by this Court. *Guggilapa Peddaya of Palakot*[2] and Re *Sinnu Goundan*,[3] too, do not follow Cr.R.C. No. 867 of 1916.

There is another reason why this petition must be allowed. The Magistrate, by allowing the case to be reviewed after his predecessor had acquitted the accused and closed the case, was in effect revising or reviewing his predecessor's order. As pointed out by Wallace and Jackson, JJ., in In re, *Ekambara Mudali*,[4] Subordinate Courts have no power of reviewing their own judgments. If they pass a wrong order and wish to set it right, they must apply to the District Magistrate to refer the matter to the High Court for correction.

The present proceedings now pending before the Stationary Sub-Magistrate of Gannavaram are quashed.

K. S. ——— *Petition allowed.*

1. (1917) 33 M.L.J. 121: I.L.R. 40 Mad. 976.
2. (1910) I.L.R. 34 Mad. 253.
3. (1914) 26 M.L.J. 160: I.L.R. 38 M. 1028 at 1029.
4. (1930) 59 M.L.J. 708: 53 Mad. 870 at 871.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

M. A. Subramania Aiyar (died) and another .. *Appellant** (*Plff. and his L.R.*)

v.

The Province of Madras, represented by the Collector of Malabar, Calicut .. *Respondent* (*Defendant*).

Subramania Aiyar *v.* The Province of Madras.

Madras Land Encroachment Act (III of 1905), S. 14—Applicability—Service of notice that Government intended to levy penal assessment—Assessment never in fact paid—Limitation under S. 14—Not applicable—Accretion formed in one season—Cannot be said to be gradual.

In a suit against the Government for a declaration of his title to certain islets in a river and for an injunction restraining the Government from assessing him to any land revenue on them, the plaintiff stated that his cause of action arose on 12th February, 1931, when he was served with a notice that the Government intended to levy penal assessment. The suit was not brought within six months of that date. On the question of limitation,

Held, that the sending of the notice does not of itself constitute any grievance at all. It is only the levying of the penalty that really constitutes the grievance. In the circumstances, S. 14 of the Madras Land Encroachment Act cannot apply to the case and the only Article of the Limitation Act which is applicable is Art. 120 and the questioning of the plaintiff's title by the notice gives him the right of suit.

Held also an accretion formed in one season only cannot be described as gradual.

Appeal against the decree of the District Court of South Malabar, dated 5th April, 1939 and passed in A.S. No. 86 of 1936, preferred against the decree of the Court of the District Munsif of Calicut, dated 6th December, 1935 and passed in O.S. No. 39 of 1932.

N. R. Sesha Aiyar for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises from a suit filed by the owner of part of two islets in the Mammili river in South Malabar against the Government for a declaration of his title to certain other portions of these islets which have, according to the findings of the learned District Judge, come into existence in more recent times and for an injunction restraining the Government from assessing him to any land revenue on these portions of the islets. The suit has been dismissed by the first Court and dismissed again in appeal by the learned District Judge of South Malabar on two grounds, firstly on the merits because the plaintiff has failed to prove that he is entitled to the newly formed portions of the islets, and secondly because the suits were barred by limitation. Both these points were argued in second appeal before me.

It seems to me that on the question of limitation the Courts below are wrong. They say that the suit was barred because it

*S.A. No. 89 of 1940. 7th April, 1942.

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was not brought within six months of the 12th February, 1931, on which date according to the plaintiff his cause of action arose. That was the day on which a notice was served upon him that the Government intended to levy penal assessment. S. 14 of the Madras Land Enroachment Act no doubt says that if any one deems himself aggrieved by any proceedings under the Act he shall not be prevented from applying to the Civil Courts for redress, but that he must do so within six months from the date on which the cause of action arose. If, therefore, the sending of the notice constitutes the plaintiff's grievance, his suit will be out of time; but there is an explanation to S. 14 which says that where the cause of action is in respect of any assessment or penalty it shall be deemed to have arisen on the date on which such assessment or penalty was levied. By the word "levied" is meant "collected" as been held in *Kesava Chetty* v. *Secretary of State for India.*[1] It is therefore impossible that in this case, if S. 14 of the Madras Land Encroachment Act is applied, there can be any question of limitation at all, because, as I have been informed, the assessment has never in fact been paid. The sending of the notice does not of itself constitute any grievance at all. It is only the levying of the penalty that really constitutes the grievance, as has been recognised in *Narayana Pillai* v. *Secretary of State.*[2] Here no doubt the plaintiff has stated that his cause of action arose on this particular day in 1931. In other words it was by their action in sending the notice that the Government unmistakably intimated to him that they were questioning his title. It is the questioning of his title that gives him the right of suit. It seems to me in these circumstances that S. 14 of the Madras Land Encroachment Act cannot possibly apply to the present case and that the only article of the Limitation Act which is applicable is Art. 120 and that under that article the suit was filed well within time.

On the merits, however, I can see no reason to differ from the Courts below. The findings of fact are that the portions of these islets which are now in dispute were formed in the year 1924 as the result of unprecedented floods in Malabar District. There is nothing to show that there had been any accretion before 1924 over a period of at least thirty years. There is a finding by the learned District Judge of further accretions having taken place in the year 1932 after the suit was filed. But there again the learned Judge has stated that there is no evidence to show that these accretions were natural as opposed to artificial. It seems to me impossible to hold that where an accretion has been formed in one season and one season only the process of accretion can be described as gradual. No doubt as has been pointed out in *The Secretary of State for India* v. *Rajah of Vizianagaram,*[3] different considerations apply to rivers in India from those applicable to rivers in England, and the words "gradual accretion" must be viewed with special reference to the conditions which prevail in Indian rivers. Mr. Justice Ayling in that

1. (1918) 36 M.L.J. 222: I.L.R. 42 Mad. 451.
2. (1912) 23 M.L.J. 162.
3. (1916) I.L.R. 40 Mad. 1083.

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case said that where it was the normal action of physical forces which brought about the accretion, then the accretion could come within the English rule of law and this principle was approved subsequently on appeal by the Privy Council. It seems to me, however, as I have already stated in another somewhat similar case reported in *Narayani* v. *Krishnan Nambiar*,[1] that the expression 'normal action of physical forces' cannot apply to circumstances like these in which on the occurrence of abnormal floods in a single year the whole of the accretion has been formed. It is perhaps possible that if the attitude of the plaintiff had been different in this case, he might have been able to convince the learned Judges who tried the suit and heard the appeal of his title; but unfortunately for him, his case in the plaint was that there had never been any accretion at all, and that the islets as they existed in 1931 had always existed. Naturally enough with a case of this kind he made no attempt to prove that there was any gradual accretion and when I find that the learned District Judge on a question of fact has held that the whole of the accretion took place in one season I am unable to see that he can be said to be wrong when on these facts he says that there has been no gradual accretion.

In the result, therefore, I am of opinion that this appeal must fail and it is accordingly dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Ismail Rowther .. *Appellant**
(*Petr.—Plaintiff*)

v.

Gomakkani Rowther and another .. *Respondents*
(*Respts.—Defendants*).

Ismail Rowther v. Gomakkani Rowther.

Limitation—Decree for payment of money in three annual instalments—Provision that in case of default in any instalment decree-holder should be at liberty to recover whole amount—Default in first instalment—Execution application claiming whole amount returned for amendment and never re-presented—Next application for execution more than three years thereafter—If barred by limitation—Election.

In a decree for the payment of money in three annual instalments the first of which was due on 10th April, 1935, there was a clause that if default was committed in the payment of any of the instalments the decree-holder should be at liberty to apply immediately for the recovery of the whole of the amount due. As no money was paid in regard to the first instalment the decree-holder presented on 23rd September, 1935, an execution application claiming the whole amount of the decree. The application was returned to him for the amendment of certain defects and was never re-presented. He then presented a fresh application on the 19th August, 1938. It was conceded that the application of 1935 must be considered for the purposes of limitation as if it had never been made.

Held: As the execution application of 1935 never came to the notice of the judgment-debtor at all, it amounts merely to a memorandum by the decree-holder of a course which he had decided momentarily to pursue but which he subsequently abandoned. There can be no question of election to treat the whole amount as due on the date of the first application as to bar the whole decree. The application for execution is accordingly within

1. 1936 M.M.N. 473.
*A.A.A.O. No. 122 of 1940. 31st March, 1942.

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time so far as the claim for the instalments due in 1936 and 1937, are concerned and out of time so far as the first instalment is concerned.

Appeal against the order of the District Court of Trichinopoly, dated 3rd November, 1939 and made in A.S. No. 438 of 1938 preferred against the order of the Court of the District Munsif of Karur, dated 8th November, 1938 and passed in E.P. No. 456 of 1938 in O.S. No. 597 of 1933.

V. Ramaswami Aiyar for Appellant.

T. A. Ananta Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The question at issue in this appeal is whether an application made by the appellant on the 19th August, 1938, was made within time. The application was to execute a decree passed in April, 1934, which provided for the payment of Rs. 400 in three annual instalments, the first of which was due on the 10th April, 1935. There was a clause in the decree that if default was committed in the payment of any of these instalments the decree-holder should be at liberty to apply immediately for the recovery of the whole of the amount due. Accordingly, on the 23rd September, 1935, the decree-holder appellant, as no money had been paid to him in regard to the first instalment, presented an execution application to the Court in which he put forward a claim for the whole of the amount of the decree. This execution application was returned to him for the amendment of certain defects and was never re-presented. The next application is the one now under discussion, presented on the 19th August, 1938. It was contended originally by the decree-holder that this application was in time, although it was made more than four years after the date of the decree, because of the filing of the previous application. This argument was pressed both in the Court of the first instance and before the learned District Judge but has been no longer pressed before me. It is now agreed by the appellant that when an application like the one of 1935 has been presented and returned and retained ever afterwards in the custody of the applicant, it must be considered for the purpose of limitation as if it had never been made. Therefore there can be no question here of relying upon the earlier application of 1935 in order to save the later application from the provisions of the Limitation Act.

The second point, however, made by the learned advocate for the decree-holder is this:—That although his application is no doubt out of time in regard to the first instalment due in April, 1935, it is within time with regard to the second and third instalments, and therefore execution must be allowed to proceed with regard to these two instalments. This point did not commend itself to the learned District Judge on first appeal. He held that by his action in September, 1935, in presenting the earlier application, the decree-holder had definitely elected not to proceed to execute the decree for the instalments due but to enforce the penalty which it provided and execute it for the full amount of the decree. He therefore had brought it about by that action that the decree became executable in full on the 10th April, 1935. Consequently, when he applied to execute it for the first time in accordance with law in August, 1938, the whole

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decree must be considered to have become barred. It seems to me that this decision by the learned District Judge cannot be supported. The learned Judge quotes cases which lay it down that where a decree-holder has definitely elected to proceed in one of two ways permitted him by a decree he cannot be allowed later to go back upon his election and choose the second way instead of the way he originally chose. But the learned District Judge has not, it seems to me, really considered what is involved in this doctrine of election. The doctrine of election is not a mere legal prohibition to any party against ever changing his mind; it is an equitable doctrine which is applied in law in order to prevent prejudice being done to the opposite party. If I have two courses open to me, both of which affect some other party and I make it known to him by some deliberate act of my choice that I am intending to adopt one of these courses and not the other, then I cannot be allowed subsequently to change my mind to his prejudice. He will naturally adjust his future actions to my previous conduct which has become known to him. There can be no doubt therefore that if in this case the execution application of September, 1935, had been in any way communicated to the judgment-debtor there would be a case for the application of the doctrine of election. He would have been informed in 1935 in the most formal and solemn way possible that the decree-holder had made his choice, and equitably, the decree-holder in those circumstances would never afterwards have been permitted to change it. But the facts are, as already indicated, that this execution application of September, 1935, never came to the notice of the judgment-debtor at all. It amounts in effect merely to a kind of memorandum by the decree-holder of a course which he had decided momentarily to pursue but which he subsequently abandoned. It cannot in any sense be said to prejudice the judgment-debtor. There can, therefore, it seems to me, be no legal obstacle whatever to the decree-holder deciding in 1938 that he will execute the decree for the instalments which may be due as he now contends. There is nothing in the cases which were relied upon by the learned District Judge to show that the doctrine of election was applied to circumstances in which the election of one party was never made known to the other, and it seems to me that it is obviously impossible for any authority to exist which would press the doctrine so far as this.

In the result this appeal must be allowed in part and it be declared that the execution application filed by the appellant is within time so far as his claim for the instalments due in 1936 and in 1937 are concerned, and is out of time so far as the first instalment is concerned. The decree of the learned District Judge will therefore be set aside and the execution application restored and directed to be disposed of by the District Munsif in accordance with law and this judgment.

In regard to costs, the order will be that each side will give and take proportionate costs in the lower appellate Court and in this Court and that the costs of the application in the first Court will abide the result.

Leave refused.

K. S. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

T. S. Rajagopala Iyer .. *Appellant** (*Plaintiff*)

v.

The South Indian Rubber Works, Limited, Coimbatore and others .. *Respondents* (*Defendants*).

Raja-gopala Iyer *v.* South Indian Rubber Works, Ltd., Coimbatore.

Company—Application for shares—Change in prospectus in material particulars before date of allotment—Right of applicant to revoke his application for shares.

Where, after the date of his application for shares and before the date of the allotment, the prospectus of the company is changed in material particulars, for instance, by a reduction of the minimum subscription required before allotment from Rs. 40,000 to Rs. 10,000, the applicant is entitled to revoke his application.

In re *Scottish Petroleum Co.*, (1881) L.R. 17 Ch.D. 373 and *Venkataramiah* v. *Indian Industrial Bank, Ltd.*, 1929 M.W.N. 837 applied.

Mere material change in the prospectus is sufficient to entitle the applicant to revoke his application and it is unnecessary to prove misrepresentation or fraud.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in A.S. No. 22 of 1939 preferred against the decree of the Court of the District Munsif of Coimbatore in O.S. No. 583 of 1937.

T. V. Ramanatha Aiyar for Appellant.

M. Krishna Bharathi for Respondent.

The Court delivered the following

JUDGMENT.—The question of law which arises in this second appeal is whether the plaintiff is entitled to revoke his application for shares in a company when, before the date of the allotment, the prospectus of the company is changed in material particulars. The brief facts of the case in so far as they are necessary are that the plaintiff had applied for shares in the respondent company on the basis of the prospectus issued on 20th January, 1937, containing, *inter alia*, the names of several persons as directors and specifying the sum of Rs. 40,000 as the minimum sum upon which the company would proceed to allotment of the shares. Before the allotment took place, there were changes in the directorate, on which the plaintiff appellant relied as one ground on which he could withdraw his offer and decline allotment; the minimum subscription required before allotment was reduced from Rs. 40,000 to Rs. 10,000 and it was this proceeding which put the appellant upon enquiry. This important change was made on 9th May, 1937, and two days later an allotment letter was sent to the plaintiff appellant. On 26th May he wrote to the company drawing their attention to this reduction and asking for certain particulars regarding the meeting at which the change had been effected. At the same time he drew the company's attention to an announcement made in the press by some of the directors denying responsibility for the special resolution. Some correspondence ensued and eventually on 1st

*S.A. No. 671 of 1940. 26th June, 1942.

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June the plaintiff appellant repudiated his offer to take the shares on the ground of the reduction of the minimum subscription. In his letter of repudiation he made no mention of the change in the directorate. This was mentioned for the first time in the plaint filed nearly two months later. It is clear, therefore, that the change in the directorate did not operate on his mind so as to influence him in repudiating his offer. He eventually brought this suit to recover the money paid with his application for shares, after the respondent company had refused to make any refund. Both the lower Courts found against the plaintiff.

As already mentioned, the change in the directorate found no place in the correspondence immediately following the allotment and since it did not affect the plaintiff's mind at the time, there is no necessity to discuss it. It is only necessary to consider whether the change in the minimum subscription required was a material change in the prospectus which the plaintiff could rely on in repudiating his offer to take shares. When one looks at the objects of the company as disclosed in the prospectus, it is surprising that the directors could have contemplated commencing business with such a ridiculously low figure as Rs. 10,000. They proposed to erect a modern factory in which to manufacture motor tubes, cycle tyres and tubes and other rubber goods required for vacuum brakes, etc., mills, printing presses, electrical departments, rubber sheetings, toys, battery cases, rubber shoes, clothing and various other articles. The annual working expenses are shown as nearly Rs. 80,000 while the capital expenditure required was over one and a half lakhs and it requires very little knowledge of the cost of modern plant and machinery to realise that Rs. 10,000 was an absurd figure on which to proceed to the allotment of shares in such a company with such an ambitious programme.

The principle involved is to be found in *Anderson's case: In re. Scottish Petroleum Co.*,[1] which has been referred to by Sundaram Chetti, J., in the case *Venkataramiah* v. *Indian Industrial Bank, Ltd.*[2] That was a case connected with a change in the directorate, as was *Anderson's case*,[1] but the principle applies equally to the facts of the present case. In dealing with the change of the directorate in *Anderson's case*,[1] Malins, V.C., made the following observation:

"I do not think there was dishonesty when the prospectus was issued, because it was believed that Mr. Gibson and Mr. Ross would act; but when the company found that these gentlemen would not act, they were bound to issue a new prospectus containing other names, and to inform those who had applied for shares that before the allotment was made other directors had been appointed; and then it would be for the applicants for shares to say, under those circumstances, whether they would adhere to their offer or would withdraw it."

Sundaram Chetti, J., quoted the following passage from Lindley on Company Law:

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1. (1881) L.R. 17 Ch.D. 373.
2. (1929) M.W.N. 837.

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"If an application for shares is made on the faith of a statement which is true when made but which is not true when the shares are allotted, the applicant may refuse to take them."

The learned advocate for the respondent company was anxious to resist any suggestion that there had been misrepresentation but this is not the essence of the case. All that the plaintiff appellant need show is that there has been a material change in the prospectus since he made his offer and he is then entitled to decide that with this material change the prospectus of the company are not sufficiently attractive to warrant him in subscribing his money. Misrepresentation or fraud would seem to be of importance only regarding the remedies he may have against guilty directors. In the present case he has brought this suit against the company to recover the money paid and it is difficult to see on what satisfactory grounds the trial Court could hold that the suit was not maintainable. I agree with Mr. T. V. Ramanatha Aiyar, the learned advocate for the appellant, that there was a material change in the prospectus and that his client was entitled to a refund.

An attempt has been made to show that the appellant was guilty of delay but as he was acting with his father, with whom he formed a joint family, and his father lived elsewhere, the obvious explanation is that the intervening time was occupied in consulting his father as to what ought to be done.

In the result the appeal is allowed and the suit is decreed for the plaint amount together with costs throughout and subsequent interest at six per cent.

Leave refused.

K. S. — *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Ordinary Original Civil Jurisdiction.*]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE BELL.

Commissioner of Income-tax, Madras .. *Petitioner**

v.

G. D. Naidu, Industrial Educational Trust .. *Respondent.*

F.B.

Commissioner of Income-tax Madras v. G. D. Naidu. Induustrial Educational Trust.

Indian Income-tax Act (XI of 1922) S. 4 (3) (i)—Deed of trust—Terms providing for creation of trust on a later date—Strict compliance with the section necessary to claim exemption.

A person interested in motor engineering and transport companies, created an Industrial Educational Trust and purported to endow it with immovable property and shares held by him in six transport companies of which he had the control. He constituted himself as the managing trustee and gave himself full power to deal with the assets. The Instrument of Trust provided *inter alia* "that the trustees shall as early as they consider it expedient utilise the trust for the purpose of starting an institute for industrial and scientific research and training", and the foundation of the institution was left over until the companies had made sufficient money for the purpose. The founder had also reserved to himself a power to revoke the trust at any time. On the question whether on a construction of the Instrument of Trust the properties in question can be deemed to be held

*O.P. No. 289 of 1941. 2nd February, 1942.

under trust wholly for charitable purposes within the meaning of S. 4 (3) (*i*) of the Income-tax Act,

Held, that in the circumstances it could not be said that during the year of account a trust was created for wholly charitable purposes so as to entitle it to the benefits of S. 4 (3) (*i*) of the Income-tax Act.

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Commissioner of Income-tax Madras *v.* G. D. Naidu, Industrial Educational Trust.

Case stated under S. 66 (2) of the Indian Income-tax Act (IX of 1922) by the Commissioner of Income-tax, Madras.

K. V. Sesha Aiyangar assisted by *K. S. Srinivasan* for the Commissioner.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *M. Subbaraya Aiyar* for Assessee.

The Judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—On the 24th January, 1938, one G. D. Naidu, a gentleman largely interested in motor engineering and transport companies in the Coimbatore District, created the G. D. Naidu, Industrial Educational Trust and purported to endow it with the shares held by him in six transport companies of which he had the control and immovable property worth Rs. 1,10,000. Mr. Naidu constituted himself the managing trustee of the trust and gave himself full power to deal with its assets. This reference arises out of a claim made under S. 4 (3) (*i*) of the Indian Income-tax Act by Mr. Naidu, as the managing trustee, for a refund of the tax paid in respect of dividends declared on the shares held in these transport companies. The Income-tax authorities refused to allow a refund. Their reason was that the shares were not held under trust wholly for charitable purposes within the meaning of the section. The managing trustee having asked the Commissioner of Income-tax to state a case to this Court under S. 66 (2) of the Income-tax Act, the Commissioner has referred this question:

"Whether on a proper construction of the Instrument of Trust, dated 24th January, 1938, the properties in question were held under trust for charitable purposes within the meaning of S. 4 (3) (*i*) of the Indian Income-tax Act."

The transport companies in which Mr. Naidu was interested had accumulated their profits from the date of their incorporation in 1932, but after the execution of the deed of the 24th January, 1938, they declared dividends amounting in the aggregate to Rs. 3,49,155 of which Rs. 2,75,340 represented the dividends on Mr. Naidu's shares. The Rs. 2,75,340 was not, however, paid over to the trustees. The money remained with the companies. All that the trust received were promissory notes of the face value of Rs. 2,75,340.

The objects of the trust may be stated shortly as follows:—

(1) To provide permanent facilities for the improvement of motor, electrical and other industries and transport in the country.

(2) To found an institution providing for research, education and training in this connection.

(3) To ensure the permanence and efficiency of the institution by placing at its disposal the workshops and the motor transport concerns in which the founder is interested.

If the assets which Mr. Naidu purported to set apart were to be devoted directly to such objects, no doubt the trust would be entitled to the refund claimed; but the deed clearly shows that the

F.B.

Commissioner of Income-tax Madras v. G. D. Naidu, Industrial Educational Trust.

Leach, C. J.

contemplated institution was not to be brought into being immediately and that the companies in which Mr. Naidu was interested were to have the benefit of these assets set apart by him. Cl. 54 of the deed provides that so long as Mr. Naidu holds the office of managing trustee he shall have the power to borrow to any extent on the properties conveyed to the trust and that the board of trustees shall be able to borrow moneys which are necessary to discharge debts contracted by Mr. Naidu. The power given to him is not limited to borrowing for the purpose of the trust. Apparently he can borrow moneys for his own purposes on the security of the assets set apart by him. By Cl. 55 the trustees are empowered, so long as Mr. Naidu holds the office of managing trustee, to sell immovable properties belonging to the trust "in expanding or floating industrial institutions," in other words for the purpose of floating other companies. Cl. 59 provides that the trustees may advance to the companies in which Mr. Naidu is interested moneys for (*a*) discharging their liabilities, (*b*) purchasing and substituting diesel or other more economical engines for the petrol engines on buses run by them, and (*c*) constructing passenger sheds and garages and other "amenities and facilities" for the use of the transport services "wherever the trust is interested".

Cl. 60 deals with the foundation of the proposed institution. It reads as follows:—

"That the Trustees shall as early as they consider it expedient utilise the Trust for the purpose of starting an institute for industrial and scientific research and training, with a factory attached thereto, for the manufacture of all or any types of automobiles, electrical plants, mills and other machinery and all accessories and equipment therefor, or other goods approved by the Board of Trustees from time to time for providing training to deserving persons irrespective of sex, caste, creed or colour in such scientific research experimental work, and manufacture or industries."

The foundation of the institution was apparently to be left over until the companies had made sufficient money for the purpose. By Cl. 71 Mr. Naidu reserves to himself the power to revoke the trust at any time.

In view of the provisions of the deed by which the assets can be utilised for Mr. Naidu's own purposes or the purposes of his companies, it is impossible for him to contend with reason that the deed creates a trust wholly for charitable purposes. The idea that some day the institution contemplated by the deed may be founded is not sufficient compliance with the section.

It is said that in 1939 Mr. Naidu made considerable alterations in the trust deed and that these alterations remove the objections now referred to. Whether the deed as it now stands creates a trust which is entitled to the benefits of S. 4 (3) (*i*) is a question with which the Court is not concerned. It is concerned only with the question whether a trust was created wholly for charitable purposes in the year of account, 1937-38 and it is obvious that this was not the case. The Commissioner of Income-tax has correctly appreciated the situation and the question referred will be answered in accordance with the opinion expressed by him.

The Commissioner is entitled to his costs which we fix at Rs. 250.

K.C. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Mangipudi Vyagreswarudu and others .. *Petitioners**
(Defts. 2 to 4)

v.

Boddapati Bhadramma and another .. *Respondents*
(Plff. and 1st Deft.).

Mangipudi Vyagreswarudu *v.* Boddapati Bhadramma.

Limitation Act (IX of 1908), Ss. 19 and 21 (3) (b)—Acknowledgment by manager of joint Hindu family after his adjudication keeps the debt alive against coparceners.

The acknowledgment of a debt made by the manager of a joint Hindu family after he was adjudged an insolvent can save limitation as against his other copaparceners.

Petition under S. 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Amalapuram, dated the 12th August, 1939 and passed in S.C.S. No. 4 of 1939.

K. Bhimasankaran for Petitioners.

P. Somasundaram and *P. Suryanarayana* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners here were defendants, 2, 3 and 4 in a Small Cause suit on two promissory notes. The promisor was their father the first defendant. The first and second defendants were adjudged insolvents on 7th August, 1935. The adjudications were disputed in appeal and eventually the adjudication of the second defendant was cancelled and that of the first defendant was confirmed. During the period between the adjudication and the decision in the appeal, there were endorsements on the two promissory notes which are relied upon as acknowledgments saving limitation under S. 19 and S. 21 (3) (b) of the Limitation Act. The Official Receiver was not a party to the suit and the suit as against the first defendant has therefore been dismissed.

It is argued in revision that the suit should also have been dismissed against defendants 2 to 4 on the ground that it is barred by limitation. The first defendant is admittedly the manager of the family and the debt is a family debt. The argument is that the acknowledgment made by the first defendant after he was adjudged an insolvent canot save limitation as against the other coparceners on the ground that the manager's right of sale of the family properties to discharge a family debt incurred by him as manager vests in the Official Receiver. This argument rests on the assumption that the right to acknowledge the debt depends on the subsistence in the person acknowledging that debt of a power of sale of the properties against which the debt is to be enforced. It seems to me that this assumption is not correct. There would no doubt have been a certain logic in holding that when once a man is declared an insolvent, since his debts can only be claimed by proceedings in the insolvency against the properties vested in the Official Receiver, the Official

*C.R.P. No. 718 of 1940. 2nd April, 1942.

Mangipudi Vyagreswarudu v. Boddapati Bhadramma.

Receiver alone would be the proper person to keep that debt alive. That is not however, the view which the Courts have taken. It has been repeatedly held that an acknowledgment by an insolvent in his schedule of liabilities filed after his adjudication is a good acknowledgment to keep alive a debt as against himself, notwithstanding the fact that all his properties at the time when this schedule is filed are vested in the Official Receiver who alone can sell those properties in order to discharge his debts. This power to acknowledge has been recognised as one which extends to the power of an insolvent father to bind his sons under the pious obligation theory—Vide *Mohana Reddi* v. *Gangaraju*,[1] I have not been referred to any case which has held that after the insolvency of the manager, the manager cannot acknowledge a debt binding the other coparceners as a family debt. And I can see no principle upon which such a result could be reached without throwing overboard the principles adopted by the Full Bench in *Mohana Reddi* v. *Gangaraju*,[1] If an insolvent after his adjudication can acknowledge his own debt, surely he can equally acknowledge a debt binding on the family of which he still remains the manager, notwithstanding his insolvency.

In this view, I dismiss the civil revision petition with costs.

K. S. ——— *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KUPPUSWAMI AYYAR.

In the matter of

Sri S.P., First Grade Pleader, Markapur.*

F.B.

S. P, First Grade Pleader, *In the matter of.*

Legal Practitioners Act (XVIII of 1879), S. 13—Letter addressed by pleader to Governor of the province relating to orders passed by a District Munsiff and making false accusations against him—If amounts to misconduct affording "reasonable cause" for taking disciplinary action.

A first grade pleader practising at Markapur wrote a letter as "the leader of the Bar at Markapur" to the Governor of Madras in which he accused the local District Munsiff of being a sympathiser with the *satyagraha* movement and that on a particular day he granted an application of an advocate for adjournment of a case made on the ground that he desired to go to another town to see a friend offering *satyagraha*. It was found on inquiry that the statements were false and that the action of the pleader in making the communication was the result of animosity towards the District Munsiff because the District Munsiff had given decisions against him. In proceedings instituted against the pleader under S. 13 of the Legal Practitioners Act, it was contended that the offence was more in the nature of contempt of Court than professional misconduct.

Held: As the letter related to orders passed by the District Munsiff and the accusations were made by the pleader as the "leader of the local Bar" it was idle for him to suggest that his misconduct should be regarded as being entirely dissociated from his status as a legal practitioner. In the cirumstances, there was "reasonable cause" for taking disciplinary action against him.

This case came on for hearing after service of notice under S. 13 (*b*) of the Legal Practitioners' Act on the pleader above-

1. (1941) 2 M.L.J. 311 (F.B.).

* Ref. Case No. 40 of 1941. 16th December, 1941.

F.B.

S. P., First Grade Pleader, *In the matter of.*

named, calling upon him to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court for his grossly improper conduct in the discharge of his professional duty.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) in support of the notice.

V. Govindarajachari and *B. V. Ramanarasu* for the Pleader.

The Judgment of the Court was delivered by

Leach, C. J.

THE CHIEF JUSTICE.—The respondent is a first grade pleader practising at Markapur in the Kurnool district. He has been charged with professional misconduct in that he wrote a letter to the Governor of Madras, wilfully and maliciously making untrue statements reflecting on the District Munsiff of Markapur. The charge has been investigated by the District Judge of Kurnool and he has reported to this Court that it has been fully substantiated.

In the letter referred to the respondent accused the District Munsiff of being a sympathiser with the *satyagraha* movement and that on the 28th February, 1941, he granted an application of an advocate for adjournment of a case made on the ground that he desired to go to Cumbum to see a friend offering *satyagraha*. He added:—

> "I am the leader of the Bar here. I have put in 26 years in the profession. I may be permitted to submit, this sort of sympathy of a Judicial Officer, with the *satyagraha* movement which is working havoc in the country, is most oppressively shocking and unprecedented in the annals of judicial administration and should be nipped in the bud. Markapur is a most law abiding town. It has contributed comparatively the biggest amount of the District War Fund. The presence of such sympathetic officers may adversely affect in all possibility. I may also humbly submit that there are several instances when motions for adjournment on strongest conceivable grounds, *e.g.*, deathed illness, official duty, etc., were refused by the same learned District Munsiff."

After a careful review of the evidence recorded in the course of the inquiry the District Judge came to the following conclusions: (1) the respondent's version of what happened in Court on the 28th February, 1941, was entirely false; (2) the allegation that the District Munsiff is a sympathiser with the *satyagraha* movement, was also devoid of truth; (3) the respondent had falsely posed as an enthusiastic supporter of the war effort in order to lend colour to an unwarranted attack on the District Munsiff; and (4) the action of the respondent was the result of animosity towards the District Munsiff because the District Munsiff had given decisions against him. In the words of the District Judge the respondent is a person who takes his forensic defeats badly. Mr. Govindarajachari, on behalf of the respondent, has very properly stated that the findings of fact cannot be challenged and consequently he has confined his address to the Court to two points. In the first place he says that the respondent's conduct is not unprofessional, but in the nature of contempt of Court. In the second place he says that there has been no accusation of dishonesty against the District Munsiff and the Court should deal leniently with the respondent.

S. P., First Grade Pleader, *In the matter of.*

Leach, C J.

With regard to the contention that the respondent's offence is more in the nature of contempt of Court than professional misconduct it has to be borne in mind that the letter which the respondent addressed to the Governor of the Province related to orders passed by the District Munsiff and the accusations were made by the respondent as "the leader of the Bar at Markapur." In these circumstances it is idle for the respondent to suggest that his misconduct should be regarded as being entirely dissociated from his status as a legal practitioner. In his professional capacity he has made a malicious and defamatory attack on a Judge and consequently we consider that he has been properly charged with professional misconduct. We should have thought that this was apparent without recourse to authority, but a decision of the Privy Council and two decisions of this Court have been quoted in the course of the arguments, and we think that we might refer to them. The first of these cases is *In the Matter of Sashi Bhushan Sarbadhicary.*[1] An advocate of the Allahabad High Court had been suspended from practice for a period of four years because he had published an article in a periodical of which he was the editor. The article contained libellous statements in respect of a Judge before whom he had appeared on a particular occasion and against other Judges of the Court in their judicial capacity. The respondent in that case appealed to the Privy Council because he said that the Allahabad High Court had erred in holding him guilty of professional misconduct for what he had written in his capacity as the editor of the periodical. The Judicial Committee refused to accept this contention and dismissed his appeal. Their Lordships considered what constituted "reasonable cause" for the suspension of an advocate from practice under the power conferred by the Letters Patent. They said that they would not attempt to give a definition of "reasonable cause" or to lay down any rule for the interpretation of the Letters Patent in that respect because every case must depend on its own circumstances. But they added:—

"The Rules of the Court, to which reference has been made, indicate the precautions taken by the Court itself to secure that the powers shall not be used capriciously or oppressively, and there is no reason to apprehend that the just independence of the bar runs any risk of being impaired by its exercise. On the other hand, it is essential to the proper administration of justice that unwarrantable attacks should not be made with impunity upon Judges in their public capacity; and having regard to the fact that in this case a contempt of Court was undoubtedly committed (and, as the evidence shews, not for the first time) by an advocate in a matter concerning himself personally in his professional character, their Lordships agree with the conclusion at which the Judges of the High Court arrived, and that there was "reasonable cause" for the order which they made."

In the present case the proceedings were instituted under S. 13 of the Legal Practitioners Act, 1879 not under Cl. 10 of the Letters Patent of this Court, but the position is the same. S. 13 of the Legal Practitioners Act, 1879, also gives the High Court power to suspend or dismiss a pleader for "reasonable cause".

1. (1906) 17 M.L.J. 74: L.R. 34 I.A. 41: I.L.R. 29 All. 95 (P.C.).

The present case is even stronger against the respondent than the case which was carried to the Privy Council from the Allahabad High Court. The letter in respect of which the respondent in the present case is charged was written as "the leader of the Bar at Markapur."

In *The District Judge of Kistna* v. *C. Hanumanulu*,[1] a Full Bench of this Court suspended a pleader from practice because he had sworn and filed in Court an affidavit in which he made unjust aspersions, imputations and insinuations couched in insulting language charging a District Munsiff with rancour and prejudice against him and with a desire to injure him and to make common cause with his political opponents in the Bezwada Municipal Council. In *re a Second Grade Pleader*,[2] another Full Bench of this Court suspended a pleader's sanad for having sworn a false affidavit in which he stated that he had seen a Magistrate receive a bribe.

There can be no doubt that the respondent is guilty of professional misconduct and this being the case all which remains to be considered is the penalty to be imposed. In the last mentioned case the pleader was suspended for one year and ten months, but the libel there was of a more serious nature than it is here because it contained a charge of bribery. At the same time the respondent's offence is not a light one. Learned counsel for the respondent has, however, expressed on behalf of his client regret for the misconduct and has given an undertaking that the offence will not be repeated. In these circumstances we consider that it will be sufficient to order that the respondent's sanad be suspended until the end of 1942, and there will be an order accordingly.

K. S. ——— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Katambot Thazhathe Kovila Kath Vikkara Vellodi, Managing Partner of K. Vikkara Vellodi and Brothers .. *Appellant** *(2nd Respt.)*

v.

Bankalath Avaran Kutty and others ... *Respondents* *(Petrs. & 1st Respt.).*

Madras Agriculturists' Relief Act (IV of 1938), Ss. 15 and 19—Distinction between—Claim for rent—Order entering up part satisfaction—Appealability—Order as to costs—Whether gives right of appeal—Payment of panaya purappad—*Whether rent.*

Under S. 19 of Madras Act IV of 1938, what is contemplated is a complete recalculation of the amount to be decreed with reference to the provisions of Ss. 8 and 9 of the Act, and the result normally is a decree which has a totally different basis from the original decree. If the amount

1. (1915) I.L.R. 39 Mad. 1045 (F.B.).
2. (1928) 55 M.L.J. 170: I.L.R. 51 Mad. 798 (F.B.).
*A.A.A.O. No. 29 of 1940. 10th March, 1942.

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already paid towards the debt is sufficient to wipe off the debt as scaled down, then an order of satisfaction is recorded and against that there is no right of appeal. If, however, the debt as scaled down, is not discharged the section contemplates the drafting of a fresh decree capable of execution and this fresh decree gives rise to a right of appeal. But the process contemplated under S. 15 of the Act is different. In such a case there is no question of recalculating the amount due under the decree for rent and all that was to be done is to examine the amount of the deposit and see whether it is sufficient to satisfy the rent as decreed for fasli 1347 and to what extent it is sufficient to satisfy the rent as decreed for fasli 1346 and then to enter up satisfaction of the older arrears under the decree proportionately to the extent to which the arrears for those two faslis have been satisfied. In such a case the whole process is not one of amendment but one of satisfaction and there is no right of appeal. And the mere fact that the Act in such a case safeguards the decree for costs will not make the order appealable.

Periodical payments of *panaya purappad* are not rent for the purpose of S. 15 of Madras Act IV of 1938 and an assignee of the right to collect arrears of rent is not a jenmi or intermediary for the purpose of that section.

Appeal against the order of the District Court of South Malabar, dated 8th August, 1939, and made in A.S. No. 422 of 1938, preferred against the order of the Court of the District Munsif of Manjeri in E.A. No. 466 of 1938 in O.S. No. 159 of 1935.

K. Kuttikrishna Menon for Appellant.

P. Govinda Menon for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.

WADSWORTH, J.—This appeal arises out of proceedings instituted under Ss. 15 and 19 of Act IV of 1938, a reference to Or. 21, r. 2 of the Civil Procedure Code, being also added in the application. The applicants in the trial Court were persons liable to make periodical payments known as *panaya purappad* and the present appellant was an assignee of the right to collect those payments. We have no doubt held that these periodical payments of *panaya purappad* are not rent for the purpose of S. 15 of Act IV of 1938, and also that an assignee of the right to collect arrears of rent is not a jenmi or intermediary for the purpose of the same section. The trial Court, however, treated this payment as one of rent and treated the respondent as a person standing in the position of a jenmi or intermediary and recorded satisfaction of the decree for arrears of this periodical payment, except for the amount of costs, on the deposit of the arrears for the two years contemplated in S. 15. The decree-holder, mistaking his remedy, filed an appeal before the District Judge and no objection was taken as to the maintainability of the appeal. The appeal was dismissed and a second appeal has been filed here.

The question is whether the second appeal lies. No appeal is, of course, provided in the Act. We have repeatedly held that when a decree has been amended under S. 19 of the Act, an appeal lies under the ordinary law against the amended decree, though no appeal lies against an order recording full satisfaction of the decree under that section. There is no procedure

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prescribed in the Act for dealing with decrees for rent, though clearly under S. 15 of the Act rent can be discharged by the procedure in that section even though it has been decreed and S. 16, expressly safeguards any amount decreed as costs. In a case *Ramadoss Reddiar* v. *Muniswami Reddiar*,[1] this Bench observed that a procedure similar to that laid down for debts by S. 19 could be invoked under S. 15 for the discharge of a decree for rent and this observation has been followed in a number of cases where the Court was actually concerned with the discharge of a decree for rent. An instance is *Venkata Rajagopala Krishna Yachendra Bahadur* v. *Venkata Seshacharlu*.[2]

It has been argued before us that, when under S. 19 a decree for a debt is amended and the resultant amended decree for a lesser amount is not satisfactory to either party, an appeal lies against the amended decree; therefore it is contended when under the analogous procedure for dealing with rents, the amount due under the decree is partly satisfied by the statutory deposit and satisfaction of the old arrears and there remains a decree for costs, the effect of this process is, in fact to alter the original decree by the cancellation of part of its provisions and to substitute for it a decree for costs only, recording satisfaction of the balance. This process, it is argued is nothing more than the passing of an amended decree which would give rise to a right of appeal. We find ourselves unable to accept this contention.

Under S. 19 that which is contemplated is a complete recalculation of the amount to be decreed with reference to the provisions of Ss. 8 and 9 and the result normally is a decree which has a totally different basis from the original decree, If the amount already paid towards the debt is sufficient to wipe off the debt as scaled down, then an order of satisfaction is recorded and against this there is no appeal. If however the debt, as scaled down, is not discharged, the section contemplates the drafting of a fresh decree capable of execution and this fresh decree naturally gives rise to a right of appeal just as the original decree was appealable. The process contemplated under S. 15 is different. There is no question of recalculating the amount due under the decree for rent. The basis upon which the decree was passed remains unaltered. All that was to be done is to examine the amount of the deposit, see whether it is sufficient to satisfy the whole of the rent as decreed for fasli 1347 and to what extent it is sufficient to satisfy the rent as decreed for fasli 1346. Then satisfaction has to be recorded of the older arrears under the decree proportionately to the extent to which the arrears for these two faslis have been satisfied. Costs are statutorily safeguarded and the whole process is not one of amendment but one of satisfaction. It cannot, having regard to previous decisions, be regarded as a process of satisfaction in execution. It is a statutory satisfaction under the special provisions of the Special Act. No appeal is provided by that Act and we are not

1. (1940) 2 M.L.J. 825. 2. (1941) 2 M.L.J. 655.

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prepared to hold merely because the Act safeguards the decree for costs, that this residuum of the decree can be regarded as an amended decree giving rise to a right of appeal.

The appeal is therefore dismissed with costs.

B. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE HAPPELL.

Shunmuga Kone, *In re.*

Shanmuga Kone .. *Prisoner** (*Accused*).

Criminal Procedure Code (V of 1898), S. 288—Case of murder—Circumstantial evidence—Statement before committing Magistrate—Witness not speaking truth before Sessions Judge—Power of Judge to act under S. 288.

In a case of wife murder there was no direct evidence of the offence. The evidence of one witness proved the presence of the accused near where the deceased lady was found and another witness had deposed before the Committing Magistrate that she saw the accused running away immediately after she had heard cries from the deceased and that his clothes were stained with blood. In her evidence before the Sessions Judge however the latter witness denied that she was anywhere near the spot on the date of offence. The Judge held that the said witness was not giving true evidence before him and admitted her evidence before the Committing Magistrate under S. 288, Criminal Procedure Code.

Held, that there could be no legal objection to the Sessions Judge taking action under S. 288, Criminal Procedure Code, after he came to the conclusion that the witness was not giving true evidence before him.

Bajrangi Lall v. *The Empress*, (1899) 4 C.W.N. 49 and *King-Emperor* v. *Bhut Nath Ghose*, (1902) 7 C.W.N. 345 considered.

Trial referred by the Sessions Judge of the Court of Session of the Tinnevelly Division for confirmation of the sentence of death passed upon the said Prisoner in case No. 111 of the Calendar for 1941 on 26th September, 1941 and appeal by the said prisoner against the said sentence.

N. T. Raghunathan for Prisoner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Judgment of the Court was delivered by

King, J.

King, J:—The appellant has been convicted of the murder of his wife Valliammal by the learned Sessions Judge of Tinnevelly and has been sentenced to death.

The prosecution case is that the appellant recently married Valliammal as his second wife and that there were misunderstandings between them because he had not taken back property which he had delivered to his first wife in order to make over some of it to Valliammal. There is, however, no evidence of any actual quarrel preceding the offence. Valliammal was killed on the afternoon of the 10th March, 1941. She was then out in a cholam field near a well. At the well P.W. 5 was baling water. In the field next to that of the deceased, according to the evidence given by her in the Committing Magistrate's Court, was a young girl P.W. 4. There is no direct evidence of the offence. Evi-

*Referred Trial No. 185 of 1941, and Crl. App. No. 672 of 1941. 2nd December, 1941.

dence is given by P.W. 5 which proves the presence of the appellant near where the deceased's body was found and P.W. 4's evidence before the Committing Magistrate was that she saw the appellant running away immediately after she had heard cries from the deceased and that the appellant's clothes were stained with blood. In her evidence before the Sessions Judge P.W. 4, however, denied that she was anywhere near the spot on the afternoon of the 10th March, and she said that she had been induced by one Vedikara Kone and others whose names she did not remember to give evidence before the Magistrate. The learned Judge believing that the witness was not giving true evidence before him admitted her evidence before the Committing Magistrate under the provisions of S. 288 of the Criminal Procedure Code.

The appellant denied having committed the offence and denied the whole story of the misunderstandings between himself and Valliammal. He said indeed that he had never been married to her and that in all probability Valliammal's former husband Kottiappa Kone must have killed her. The question of the relationship between the appellant and Valliammal has not been seriously pressed before us. It was contended at the trial that in the caste to which the parties belong divorce and re-marriage are not permitted and therefore it would have been impossible for the appellant to have married Valliammal. It has, however, been pointed out by the learned Sessions Judge that when questions were put to him by the Committing Magistrate to the effect that witnesses gave evidence that he had killed his wife, the appellant in replying did not deny that she was his wife and it has been further pointed out that even in the evidence of the defence witnesses who were examined to speak to this point only, instances were not scarce of re-marriages being permitted in the caste.

It was argued for the appellant that the learned Sessions Judge ought not to have admitted the evidence of P.W. 4 before the Committing Magistrate. The learned advocate even went so far as to say that such evidence was essentially inadmissible on the ground that the Judge had not conducted an inquiry to satisfy himself beforehand that the evidence given by P.W. 4 before him was false and the evidence given before the Committing Magistrate was therefore likely to be true. Our attention was called to two rulings from Calcutta, *Bajrangi Lall* v. *The Empress*[1] and *King-Emperor* v. *Bhut Nath Ghose*,[2] in support of this argument that the evidence of P.W. 4, before the Committing Magistrate was without some such preliminary inquiry inadmissible. We do not find, however, the learned Judges of the Calcutta High Court laying down any such proposition. In these rulings all that they have indicated is that they did not agree with the view of the trying Court and that the trying

1. (1899) 4 C.W.N. 49.
2. (1902) 7 C.W.N. 345.

Shunmuga Kone, *In re.*

Court ought to have realised that the evidence of the witnesses in question before the Committing Magistrate was not in fact true. Quite clearly there can be no legal objection to the Sessions Judge in this instance taking action unde S. 288. It is quite clear that the Sessions Judge had made up his mind that the witness was not giving true evidence before him.

As to the question whether the evidence before the Committing Magistrate was in fact true, we think the learned Sessions Judge was justified in accepting it. It has been further confirmed by the statement taken by the Taluk First Class Magistrate of Sankarankoil under S. 164 of the Criminal Procedure Code six days after the offence occurred and we find P.W. 5 in her evidence in the Sessions Court referring to the presence of P.W. 4 which P.W. 4 denied before the Sessions Judge and to P.W. 4's informing her that the appellant had been seen by her running away with blood-stained clothes. Finally, there is a clear reference in the report which P.W. 5 made to the Village Magistrate within a couple of hours or so of the occurrence that she had seen P.W. 4, that she had heard her crying out and that P.W. 4, had told her that it must have been the appellant who had committed the offence. In these circumstances we think that the evidence which P.W. 4, gave before the Committing Magistrate and which was admitted by the learned Sessions Judge under S. 288 can safely be relied upon. That evidence corroborated as it is by P.W. 5 to some extent and by the report to the Village Magistrate is we think sufficient to bring the offence home to the appellant. There are no extenuating circumstances in this case and we confirm both the conviction and the sentence and dismiss the appellant's appeal.

B. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

Sri Sri Sri Narayana Sooru Devu Garu
Rajah of Tarla and another .. *Appellants**
(Defendants)

v.

Guduru Rama Rao Pantulu Garu .. *Respondent*
(Plaintiff).

Rajah of Tarla *v.* Guduru Rama Rao Pantulu Garu.

Limitation Act (IX of 1908), *Ss.* 19 *and* 20—*Valid acknowledgment —Initialling of statement of liability—Whether sufficient—Father signing for himself and as agent of son—Effect of acknowledgment as against son.*

Where a Hindu father and son executed a promissory note and subsequently while the executants of the note were endeavouring to arrange for a loan to pay off the debts a statement of liabilities was drawn up and the said statement which included the promissory note debt was initialled by the father,

Held, that the initialling of the acknowledgment contained in the statement was sufficient compliance with the requirements of S. 19 of the

*Appeal No. 78 of 1940. 10th March, 1942.

Limitation Act, and that it was not invalid for want of the full signature of the person acknowledging the liability.

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Lakshmanacharyulu v. *Venkataramanujacharyulu*, (1926) 51 M.L.J. 414 overruled.

Tavudu v. *Venkataratnam* (1935) 68 M.L.J. 623: I.L.R. 59 Mad. 72 approved.

Velivalli Brahmaiah, In re, (1930) 59 M.L.J. 674: I.L.R. 54 M. 252 and *Lord St. John* v. *Boughton*, 9 Sim. 219: 59 E.B. 342 considered.

Held further, that the circumstances of the case disclosed that the father signed the statement on behalf of himself and as the agent of his son, and consequently the acknowledgment was operative as against the son also.

Appeal against the decree of the Court of the Subordinate Judge of Chicacole in O.S. No. 40 of 1938.

K. V. Krishnaswami Aiyar and *B. V. Ramanarasu* for Appellants.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *C. Sambasiva Rao* and *C. Siva Rao* for Respondent.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant is the Rajah of Tarla and he seeks to escape from liability in respect of a promissory note executed by himself and his father who is now dead. The appellant's case is entirely devoid of merits, but, notwithstanding this, he would be entitled to succeed on technical grounds if the legal arguments advanced on his behalf were sound. The Subordinate Judge of Chicacole, from whose decree this appeal has been preferred, found against the appellant on the facts and on the law and we concur in his findings. The attitude of the appellant towards his creditor is certainly one which does not commend itself to the Court.

On the 16th June, 1931, the appellant and his father executed a promissory note in favour of the Zamindar of Pata Tekkali for the sum of Rs. 6,000, which the payee had advanced to them in order that they might discharge in part a mortgage of the family estate. It is admitted that the mortgage had been created for family purposes. The estate is an impartible one within the meaning of the Madras Impartible Estates Act of 1904. On the 2nd December, 1937, the payee endorsed the instrument to the respondent. The appellant's father died in the month of May, 1938 and on the 14th December, of that year the respondent instituted the present suit to recover a sum of Rs. 9,896 which he claimed was then due on the promissory note. The appellant was sued personally and as representing his father's estate. He had been appointed to act as the receiver in a mortgage suit instituted by another creditor. Various defences were raised, but on appeal the appellant's case has been confined to these contentions: (1) the suit is time barred; (2) the acknowledgment of liability made by the appellant's father on which the respondent relies to save limitation, even if it amounts to an acknowledgment within the meaning of S. 19 of the Limitation Act, does not bind the appellant; and (3) the respondent cannot maintain the suit against the appellant because he is not the

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Leach, C. J.

assignee of the debt, but merely the indorsee of the promissory note.

On the 15th May, 1934, a sum of Rs. 500 was paid towards principal and interest then due on the instrument. The fact of payment was indorsed on the promissory note and the indorsement signed by the appellant and his father. On the 15th May, 1935, a sum of Rs. 1,000 was paid in reduction of the debt and a similar acknowledgment indorsed on the promissory note. In this instance the father alone signed. The promissory note was indorsed to the plaintiff by the payee on the 2nd December, 1937. The indorsement is in these words:

"The principal and interest due under this pro-note is Rs. 9,100 (in words rupees nine thousand one hundred). As we have received the said sum from Gudur Rama Rao Garu, resident of Vizianagaram, endorsement of transfer has been made in favour of the said Rama Rao and the pro-note delivered. You alone should recover the principal and interest due under the said pro-note without our being liable."

Mr. K. V. Krishnaswami Aiyar on behalf of the appellant contends that this cannot be read as an assignment of the debt, but merely as an indorsement of the promissory note. Mr. Somasundaram on behalf of the respondent does not dispute the correctness of this contention, and the case will proceed on the basis that the respondent is merely the holder of the instrument and not the assignee of the debt.

In the month of January, 1937, the appellant and his father were endeavouring to arrange for a loan of Rs. 3,00,000 to pay off the debts due by the estate; and in this connection a statement of the liabilities was drawn up. In this statement was included the amount due on the promissory note in suit and the statement was initialled by the father. The Subordinate Judge has found as a fact, and we agree with him, that the father remained the manager of the family up to the time of his death, notwithstanding that in the year 1930, he gave to his son a power of attorney. This power was executed in order that the son might help his father in the management of the estate. The statement of liabilities drawn up in January, 1937, was prepared under the appellant's directions, and that he checked it is shown by the fact that he made a correction in green ink.

The first contention raised in connection with the plea of limitation is that this statement does not amount to an acknowledgment of liability. This contention is entirely devoid of substance. The document is headed "Tarla Estate. Statement of Liabilities." The particulars of the debts are set out in six columns. In the first column is given the date, in the second column the name of the creditor, in the third the nature of the debt, whether on a mortgage or on a promissory note, in the fourth the amount borrowed, in the fifth the payments made in reduction of the debt and in the sixth column the rate of interest. This obviously is a statement of liabilities and, as already indicated, it is initialled by the appellant's father as an acknowledgment of its correctness.

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It is then said that the statement does not fulfil the requirements of S. 19 of the Limitation Act, because the appellant's father merely initialled it, whereas he should have signed his name in full. This argument is based on two decisions of this Court. The first case is *Lakshmanacharyulu* v. *Venkataramanujacharyulu*.[1] That case was decided by Odgers, J., who held that initials were not equivalent to a signature and therefore initials were not sufficient for a valid acknowledgment under S. 19. If this judgment is to be followed, it means that the appeal must be allowed; but we are not prepared to follow it. We consider that it does not express a correct statement of the law. We shall return to this question in a moment. The second case is *Velivalli Brahmaiah*,[2] In re, which was decided by Sundaram Chetti, J., also sitting alone. The question there was whether a Magistrate who initialled a judgment could be deemed to have signed it. The learned Judge held that the Code of Criminal Procedure required the signature in full. That case merely concerned the provisions of the Code of Criminal Procedure and it has no application here, where we are merely concerned with what is meant by the word "signed" in S. 19 of the Limitation Act.

In *Tavudu* v. *Venkataratnam*,[3] Venkatasubba Rao, J., held that the initialling of an acknowledgment was equivalent to having signed. He pointed out that on principle there was no reason for holding that the word "signed" should be construed as meaning "signed in full". It was immaterial whether the statement was initialled or signed so long as there was a writing underneath which verified the acknowledgment. The learned Judge considered the judgments of Odgers, J., and Sundaram Chetti, J., in the two cases, I have mentioned, and he regarded, as I do, the decision in *Lakshmanacharyulu* v. *Venkataramanujacharyulu*[1] as being erroneous. Here we have a statement of liabilities and at the foot of it, the appellant's father has written his initials in acknowledgment of the correctness of the statement. I have no hesitation in holding that this constitutes full compliance with the requirements of S. 19. It may be mentioned that in *Lord St. John* v. *Boughton*,[4] it was held that initials were sufficient. In that case the person who gave the acknowledgment was not able to write himself owing to an attack of gout and the document was initialled by his daughter on his behalf, his name appearing above the initials.

The main question is whether the initialling of the statement of liabilities by the father operates to extend the liability against the son. Sub-S. (2) of S. 21 says that nothing in Ss. 19 and 20 renders one of several joint contractors chargeable by reason only of a written acknowledgment signed or of a payment made by or by the agent of, any other or others of them. Cl. (*b*) of sub-S. (3) states, however, that for the purposes of

1. (1926) 51 M.L.J. 414.
2. (1930) 59 M.L.J. 674: 54 Mad. 252.
3. (1935) 68 M.L.J. 623: 59 Mad. 72.
4. (1938) 9 Sim. 219: 59 E.R. 342.

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Ss. 19 and 20, where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorised agent of the manager of the family for the time being shall be deemed to have been made on behalf of the whole family. For the appellant it is said that this clause does not help the respondent. It is acknowledged that it would help him if he were suing on the debt, but he is not and therefore it is said that sub-S. (2) governs the situation. On behalf of the respondent, it is said that as the father was the manager of the family and as it was a family debt his acknowledgment of liability operates to extend the appellant's liability on the instrument. The correctness of the respondent's assertion may be open to doubt, but it is not necessary to decide this question because on the evidence there can be no doubt that the father signed the statement on behalf of himself and as the agent of his son. The son prepared the document on behalf of himself and his father and left it to his father to verify the statement, which he did.

For these reasons the appeal will be dismissed with costs.

B. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

A. R. Palanisami Gounder .. *Petitioner** (*2nd Accused*)

v.

Bagavathi Gounder .. *Respondent* (*Complainant*).

A. R. Palanisami Gounder v. Bagavathi Gounder.

Criminal trial—Complaint—Part of offence omitted—Omitted part rendering complaint of Civil Court necessary—Jurisdiction of Magistrate—Offence under S. 206, Penal Code—Procedure.

The complainant stated that he had filed a suit in the Civil Court against the first accused with respect to his land, that he had filed an application in the suit for attachment of the standing crops on the land and for distraint of the first accused's cattle and that the petitioner, joining with the first accused, had removed the harvested crops and the cattle to his own field and claimed them as his with the object of preventing the Receiver appointed by the Civil Court from taking possession of the property. The petitioner contended that the offence said to be committed was one punishable under S. 206, Indian Penal Code, which required a complaint by the Civil Court.

Held, that the Magistrate had no jurisdiction to entertain the case in the absence of a complaint from the Civil Court.

When the offence complained of has relation to a Civil Court and is intended to render fruitless the proceedings of the Court it is against public policy that a Magistrate should take cognizance of the case which the Legislature clearly intended should be taken cognizance of only on the motion of the Civil Court concerned. It is not open to the Magistrate in such a case to entertain the complaint which for purposes of giving jurisdiction ignores part of the offence.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the District Magistrate of Coimbatore, dated 2nd September, 1941, in Criminal Revision Petition No. 13

*Crl.R.C. No. 915 of 1941. 12th December, 1941.
Crl.R.P. No. 861 of 1941.

of 1941, presented to revise the order of the Stationary Sub-Magistrate of Pollachi, dated 11th August, 1941 in C.C. No. 373 of 1941.

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K. S. Jayarama Aiyar for *C. K. Venkatanarasimhan* for *Petitioner*.

N. Somasundaram for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The complainant complained to the Magistrate that he had filed a suit in the Civil Court against the first accused with respect to his land, that he had filed an application in the suit for attachment of the standing crops on the land and for distraint of the first accused's cattle, and that the petitioner, joining with the first accused, had removed the harvested crops and the cattle to his own field and claimed them as his with the object of preventing the Receiver from taking possession of this property. The Magistrate came to the conclusion that an offence punishable under S. 421, Indian Penal Code, had been made out against the first accused, but not against the petitioner. The complainant took the matter to the District Magistrate in revision, who very rightly remarked that the allegations in the complaint and in the sworn statement, which were the only material on which the Magistrate had to act, implicated the petitioner equally with the first accused. He therefore ordered the Magistrate to make further enquiry into the case against the petitioner as well as against the first accused. In this Court, the petitioner contends that the offence committed was one punishable under S. 206, Indian Penal Code, which requires a complaint by the Civil Court.

The wording of S. 206, Indian Penal Code, is very much the same as that of S. 421, Indian Penal Code, except that the fraudulent removal, etc., in S. 206, Indian Penal Code, has to be with the intention of preventing property from being taken by some process of Court. It is argued for the complainant that it is open to a person in filing a complaint to ignore a part of the offence and to file his complaint with regard to the remainder. I do not agree that it is open to a Magistrate to ignore such essential ingredients of a complaint. When the offence complained of obviously had relation to a Civil Court and was intended to render fruitless the proceedings of the Court, it is against public policy that a Magistrate should take cognizance of a case that the Legislature clearly intended should be taken cognizance of only on the motion of the Civil Court concerned. The Magistrate therefore had no jurisdiction to entertain this complaint.

Mr. Somasundaram for the complainant points out that it was quite open to the petitioner to raise these points before the Magistrate. The parties are however now all represented in this Court; and as it is clear that the Magistrate had no jurisdiction to take cognizance of this case except on the complaint of the

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Civil Court concerned, it is desirable that the proceedings should be quashed and the complaint ordered to be returned to the complainant, who may move the Civil Court to take action if he is so advised. It is ordered accordingly.

B. V. V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HAPPELL.

S. S. Pattabirama Ayyar, In re.

S. S. Pattabirama Ayyar .. *Petitioner* (Accused).*

Madras General Sales Tax Act (IX of 1939), S. 15 (a)—Turnover and assessment rules, r. 11—Amendment during pendency of prosecution—If can make failure to submit a return an offence retrospectively.

By an amendment of the rules in one year an act or omission in the previous year cannot be made an offence. Where at the time the charge was laid against the accused that he had failed to submit a return under the Madras General Sales Tax Act and evaded payment of tax, he was not required by the Act to make a return but during the course of the hearing the Provincial Government made an amendment to r. 11 which if made on the 1st April, 1940, would have meant that the accused would have been liable to make a return,

Held, that the amendment of the rules could not create an offence retrospectively and the accused cannot be lawfully convicted of offences falling under S. 15 (*a*) and (*d*) of the Act.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the Judgment of the Court of the Sub-Divisional First Class Magistrate of Gobichettipalayam in C.C. No. 176 of 1940.

S. S. Ramachandra Aiyar for Petitioner.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) with *A. S. Sivakaminathan* for the Public Prosecutor for the Crown.

The Order of the Court was delivered by

Leach, C.J.

The Chief Justice:—The petitioner was charged in the Court of the Sub-Divisional First Class Magistrate of Gobichettipalayam with failure to submit a return under the Madras General Sales Tax Act and with fraudulently evading payment of tax, offences which were said to fall within S. 15 (*a*) and (*d*) of the Act respectively. The Magistrate held that the charge under S. 15 (*a*) had been proved and fined the petitioner one anna, ordering him in default of payment to undergo simple imprisonment for one day. At the time the charge was laid the petitioner admittedly was not required by the Act to make any return. During the course of the hearing the Provincial Government made an amendment to r. 11 which, if made on the 1st April, 1940, would have meant that the petitioner would have been liable to make a return. It is manifest that by an amendment of the rules in one year an act or omission in the previous year cannot be made an offence and the learned Advocate-General has very properly stated that the conviction of the petitioner cannot be supported. The amendment of the rules could not create an offence retrospectively and the petitioner has been un-

*Crl.R.C. No. 391 of 1941. (Crl.R.P. No. 370 of 1941). 8th October, 1941.

lawfully convicted. The petition will be allowed and the conviction and sentence set aside. This does not mean that for other purposes the amended rule may not have retrospective effect and the allowing of this petition is entirely without prejudice to the validity of the amendment in other respects.

S. S. Pattabirama Ayyar, *In re.*

K. S. —— *Petition allowed.*

PRIVY COUNCIL.

(On appeal from the High Court of Judicature at Madras).

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN AND SIR MAHADAVAN NAIR.

Muthukumalli Ramayya and others .. *Appellants**

v.

Uppalapati Lakshmayya .. *Respondent.*

P.C. —— Muthukumalli Ramayya *v.* Uppalapati Lakshmayya.

Limitation—Right of action barred under earlier Limitation Act—Title acquired by adverse possession—Cannot be defeated by subsequent Limitation Acts in force at time of filing suit—Hindu Law—Family settlement with limited owner—When binding on reversion.

Though ordinarily a suit by a reversioner for the recovery of immovable property would be governed by the provisions of the Limitation Act in force when the suit is instituted, where in fact the defendants are able to show that the right of action had already become barred (under the earlier Limitation Act of 1859) then the title they had acquired could not be defeated by invoking the subsequent Limitation Acts.

Where it is not shown that a person had any competing title of his own in respect of the properties in dispute there can be no basis for a valid family settlement with a limited owner giving him title which would bind the reversion.

Appeal from a decision of the High Court of Judicature at Madras.

J. M. Parikh and *P. V. Subba Row* for the appellants.

S. Hyam for the Respondent.

21st April, 1942. Their Lordships' judgment was delivered by

Sir Madhavan Nair.

SIR MADHAVAN NAIR.—These are two appeals from a decree of the High Court of Madras, dated 1st October, 1937, on appeals from the Additional Subordinate Judge of Guntur which have been consolidated and heard together.

The appeals arise out of a suit instituted by the plaintiff for recovery of possession of immovable properties, as the nearest reversioner to the estate of one Ramachandrudu on the death of his widow Achamma in 1926, on the ground that the properties appertaining to the estate had been wrongfully alienated partly by his mother and partly by his widow.

The defendants are the alienees or their successors in title. Generally stated, they may be roughly grouped as those claiming under alienations made by the mother, and those claiming under alienations made by the widow.

The suit related to 16 items of properties of which items 11 to 14 and 16 were claimed on the footing that they had been acquired with the income of the estate subsequent to Ramachandrudu's death and must be treated as accretions to that

*P.C.A. No. 5 of 1940. 21st April, 1942.

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estate. The High Court dismissed the plaintiff's claim to those items as unsustainable. The case as regards them is not now before the Board; nor is the case as regards item 1, 3 and a portion of item 7, which was compromised by the parties in the trial Court.

Ramachandrudu was a Hindu governed by the Mitakshara law. He died, as has now been found, in 1859, leaving surviving him his mother Bengaramma, a young widow Achamma and a sister Ramamma. Bengaramma died in 1878. Soon after Ramachandrudu's death there appears to have been an arrangement effected on 16th October, 1859, between Achamma and Bengaramma under which Achamma was given Rs. 100 and a remainder in inam lands in two villages after Bengaramma's death and the latter took absolutely the rest of the properties of Ramachandrudu.

On 17th March, 1866, Bengaramma executed a registered deed conveying the properties which she obtained under the above arrangement to her daughter's son Subbaramayya. This deed recited the terms of the arrangement of 1859, and Bengaramma stated in it that she had delivered that deed to her grandson "so that it might serve as a title deed." This deed has not been produced. Defendants 1 to 8 are the descendants of Subbaramayya and of his brother Velugondarayudu.

Subsequently, disputes were raised by Achamma regarding the title to the properties in the possession of Subbaramayya, and as a result, a settlement was effected between them by mediators, by the execution of two documents on 13th August, 1867, under which Achamma got absolute title to a 1|3 share of the properties covered by the deed of 17th March, 1866, and Subbaramayya to a 2|3 share.

In 1876 Achamma sold away her 1|3 share and the defendants now in possession of those properties hold them under the title derived from her.

In their written statements the defendants disputed the relationship of the plaintiff as the nearest reversioner and contended that Ramachandrudu was not the last male holder, he according to them having predeceased his father. On both points the Additional Subordinate Judge of Guntur found in favour of the plaintiff. He also found that Ramachandrudu died in or about the middle of 1859. These findings were accepted in the High Court and have not been questioned before the Board. The High Court expressed the view that Ramachandrudu must have died on some date between May and October, 1859.

The defendants also contended in the course of arguments that immediately on the death of Ramachandrudu, Bengaramma took possession of all his properties which had legally vested in Achamma, that the possession thus taken was hostile to Achamma, that "she and her transferees were in possession for over 12 years before the Limitation Act of 1871 took effect, *i.e.*, before 1st April, 1873." and "so under the provisions of section 1, Rule 12

of the Limitation Act XIV of 1859, the right of Achamma as also the right of persons representing the reversion became barred and the right which became extinct prior to 1st April, 1873, cannot be revived under the Act of 1871." The plea in this form was not pointedly raised in the written statements. In conformity with this plea the issue on the question of limitation was amended and the plea was accepted by the Additional Subordinate Judge with the result that he dismissed the plaintiff's suit as barred under Act XIV of 1859, but only with regard to 2|3 of the suit properties; as in his view "possession which started as hostile to Achamma immediately after her husband's death as regards all the properties became restricted to a 2|3 from the date of Ex. III"—the settlement effected with Achamma.

As regards the 1|3 share allotted to Achamma, subsequently alienated by her, the plaintiff was given a decree on the ground that the alienations were not justified by any legal necessity.

It may be mentioned here that issue (*iv*) in the case raised the question "whether the family settlements of 1859 and 67 pleaded by the defendants are true, valid and binding on the plaintiff." As in his opinion the suit was not in time, the Additional Subordinate Judge held it was unnecessary to find on this and some connected issues except as to the genuineness of the settlements of 1859 and 67 which he stated was "beyond cavil." Their genuineness has been accepted throughout; but the correct inference to be drawn from them, as will be shown presently, has been the subject of considerable arguments before the High Court as well as before the Board.

From the Additional Subordinate Judge's decree, two appeals were filed before the High Court, one by the plaintiff and the other by the contesting defendants affected by the decree relating to 1|3 of the properties.

In the plaintiff's appeal, the learned Judges held differing from the finding of the Additional Subordinate Judge that the evidence does not establish that Rengaramma took possession of Ramachandrudu's properties prior to the arrangement of October, 1859, that consequently Achamma had no cause of action to sue Rengaramma for possession on the footing of dispossession; that the cause of action for the plaintiff to sue the alienees arose only on Achamma's death and that therefore the Additional Subordinate Judge was wrong in holding that the remedy of the estate to recover possession of the property in Rengaramma's possession had become barred under Act IV of 1859. The High Court further held that the settlement of 1859—which is referred to as an "undoubted arrangement"—did not amount to a "surrender" of the estate by the widow in favour of the mother, and that the transfer of 1867 was in no sense a family settlement which would bind the reversioner. The appeal by the plaintiff was therefore allowed by the High Court.

The appeal by the contesting defendants as regards the 1|3 share alienated by Achamma was dismissed on the ground that

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legal necessity to justify the alienations was not made out by the appellants.

In the result, the plaintiff was given a decree by the High Court for possession of all the suit properties except the so-called accretions to the estate and those with respect to which a compromise was effected between the parties.

From this decree of the High Court, the contesting defendants—the alienees—have filed these appeals to His Majesty in Council.

In support of the appeals, Mr. Parikh, the learned counsel, first submitted that the arrangement of 1867 is in the nature of a *bona fide* settlement of family disputes in respect of Ramachandrudu's estate between the widow and Subbaramayya which in law would bind the reversioner though he was not party to it. No doubt, under this arrangement the disputes between Achamma and Subbaramayya, to whom Bengaramma had transferred in 1866 whatever she had got under the arrangement of 1859, were settled by Subbaramayya taking a 2|3 and Achamma a 1|3 share of properties; but what is important to notice is this that Subbaramayya had no rights to the properties except what he derived by the gift made in his favour by Bengaramma. Since it has not been shown that Subbaramayya had any competing title of his own in respect of the properties in dispute, there can be no basis in their Lordships' opinion for a valid family settlement between the parties which would bind the reversion. In *Khunni Lal* v. *Gobind Krishna Narain*[1] their Lordships pointed out that "the true test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life tenant." In the present case it is clear that what title Subbaramayya had to the properties was acquired under the compromise from the widow since he had no antecedent title of his own to them. In the circumstances, their Lordships agree with the High Court that the claim of the contesting defendants to a 2|3 share of the properties cannot be sustained on the basis of the arrangement of 1867.

Nor could that claim be sustained under the arrangement of 1859—the plea next urged in support of it. As the defendants deliberately suppressed the document the High Court beyond accepting the arrangement as genuine refused to draw "particular inferences as to the nature and effect of it from the recitals contained in the deed of 1867" or "to speculate as to its exact form or purport merely to support the defendants' contentions." The plea that this arrangement amounted to a family settlement put forward in the trial Court was abandoned in the High Court where it was contended for the first time that the transaction might fairly be regarded as a "surrender" by the widow in favour of the mother and that limitation against the rever-

1. (1911) 21 M.L.J. 645: L.R. 38 I.A. 87: I.L.R. 33 All. 356 (P.C.).

sioners started in 1878, when the mother Bengaramma died. See *Vytla sitanna* v. *Marivada Viranna*.[1] This argument cannot be accepted. In the absence of the document evidencing the arrangement it is unsafe to infer the true nature of the transaction from the bare reference to its terms contained in the deed of 1866. So far as their Lordships can gather from the recitals it would appear that the transaction was something in the nature of a division of the estate between Bengaramma and Achamma. The reference to the transaction as a "*vibhaga*", and also the use of the word *farikath* (partition deed) would show that the transaction was treated by the parties themselves as partaking of the nature of a division. It may well be, as pointed out by the High Court, that for reasons not disclosed in the evidence the mother-in-law took a larger portion of the estate than the daughter-in-law, but that cannot convert what is referred to as partition in the deed of 1866 into a "surrender." Further, the reservation to herself by Achamma after Bengaramma's death of an interest in remainder in two of the villages, which has not been explained, would make it difficult to hold that the "surrender" is effective as it has not been of the widow's entire interest in the properties. Their Lordships therefore reject the plea that the arrangement relied on amounts to a surrender which in law would accelerate the succession.

The next point to consider on this part of the case is whether the plaintiff's suit is barred under Cl. 1, r. 12 of the Indian Limitation Act XIV of 1859. Ordinarily the suit would be governed by the Limitation Act IX of 1908, which was the law in force when the suit was instituted; but if the defendants are able to show that the right of action had become barred under the Act of 1859 then the title they had acquired could not be defeated by the subsequent Limitation Acts.

The relevant portions of Cl. 1 of the Act of 1859 run as follows:

"No suit shall be instituted in any Court of Judicature . . . in India . . . unless the same is instituted within the period of limitation made applicable to a suit of that nature . . . and the suits to which the same shall apply, shall be the following, that is to say",

and then r. 12 states as follows:

"To suits for the recovery of immovable property or any interest in immovable property to which no other provision of the Act applies—the period of 12 years from the time the cause of action arises."

As already stated, the defendants contend that as immediately after the death of Ramachandrudu in 1859 Bengaramma took possession of his properties and held them adversely against Achamma in whom the inheritance had vested, they claiming through her, have a perfect title to the properties by efflux of time before the Act IX of 1871 came into effect in April, 1873; and that if the widow was thus barred before the new Act came into force then the reversioner is also barred.

1. (1934) 67 M.L.J. 20: L.R. 61 I.A. 200: I.L.R. 57 Mad. 749 (P.C.).

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A reversioner who succeeds to the property has *now* 12 years to bring his suit from the time "when the estate falls into possession." Under the Act of 1859 the limitation for the suit was "the period of 12 years from the time when the cause of action arises." In *Nobin Chunder* v. *Issur Chunder*[1] it was held that "the cause of action" for the widow to recover the properties arose at the time when she was dispossessed, and limitation which barred her rights would bar the rights of the reversionary heirs also. The reasoning of the decision was that the reversioner had no "new and independent" cause of action from that which was available to the widow at the time of her dispossession. Referring to the decision, their Lordships in *Aumirtolall Bose* v. *Rajoneekant Mitter*[2] observed as follows:

"It has been held by a full bench of the High Court of Calcutta that in the case of a succession by a reversionary heir after the death of a widow, who takes by inheritance from her husband, and is dispossessed, the period of limitation as against the reversionary heir, in the absence of fraud, is not to be reckoned from the time when he succeeds to the estate but from the time at which it would have been reckoned against the widow if she had lived and brought the suit (see 9 Suth.W.R. p. 505). That rule has been acted upon in other cases and it appears to their Lordships that the principle of that decision is correct."

The crucial point of time with regard to limitation being the dispossession of the widow, it follows that the question for consideration is whether or not Achamma had a cause of action against Bengaramma on the ground that she was dispossessed by her. The evidence on the point is scanty; it consists mainly of a few entries in a few revenue papers, the inferences to be drawn therefrom and the general circumstances of the case. The arrangement of 16th October, 1859, being undoubted, the defendants in order to succeed in their contention that Achamma had a cause of action against Bengaramma will have to prove that Bengaramma entered into actual possession of lands prior to that date, but there is no satisfactory evidence to support that contention. The earliest date that can be invoked in favour of the defendants is 6th February, 1860, entered in the cist book for fasli 1269 which shows that an instalment of cist with respect to dry land in one of the villages was paid "through Bengaramma," but as appears from the headnote on the page, "Receipt for fasli 1269 was granted to Upalapali Ramachandrudu pattadar of the village. . . ." Evidently the patta continued to remain in the name of the deceased Ramachandrudu. It would appear that patta was transferred to Bengaramma's name in fasli 1271—(1861-62) for we find from the cist receipt book that receipt was granted for that fasli to Bengaramma described as "pattadar" of the village of Upilapadu though along with another, Lakshmayya. These dates are all subsequent to the arrangements of October, 1859 and cannot therefore help the defendants. This sums up the evidence that has been brought to their Lordships' notice on this point. There is nothing in this evi-

1. (1868) 9 W.R. 505.
2. (1874) L.R. 2 I.A. 113 (P.C.).

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dence to establish that Rengaramma did take possession of Ramachandrudu's property prior to the arrangement of 1859. As shown by Ex. W. (8th May, 1866), when she knew that lands standing in the name of her husband were registered in the name of her mother-in-law, Achamma submitted a petition to the Collector wherein she stated that "while she is the rightful owner of the fields that were standing in the name of her husband, they were since his death registered in the name of Rengaramma, her mother-in-law." The Tahsildar took some action on this petition, but evidence does not show how the revenue authorities ultimately disposed of the matter. As the properties had been by this time conveyed by Rengaramma to her grandson, Achamma divided the properties with him, stating in her deed, referring to the document executed by Rengaramma that "I contended I too had rights to the property mentioned in the said document. . . ." In this connection it is well to remember that Achamma never joined her husband after her marriage but always lived with her parents in a different village. It is clear from her conduct that acts of dispossession, if any, on the part of Rengaramma known to her would have been objected to by Achamma, but as stated already there is no evidence of any such act of dispossession. Therefore no cause of action to sue on the footing of dispossession accrued to Achamma. Rengaramma's possession of the lands after the arrangement of October, 1859, is to be referred to that arrangement and cannot amount to dispossession giving Achamma, a cause of action to institute a suit against Rengaramma for the recovery of the properties; hence the question of adverse possession barring the rights of Achamma, the widow and consequently the rights of the plaintiff, does not arise and the latter's cause of action would only accrue after the death of Achamma, and would be a right to set aside the arrangement under which Rengaramma took possession of the lands as not binding on him. Their Lordships agree with the High Court that the Additional Subordinate Judge was not right in holding that the remedy of the estate to recover the properties in the possession of Rengaramma became barred under the Act XIV of 1859.

As regards the 1|3 share of the properties alienated by Achamma, the lower Courts have found on the merits that the evidence does not establish that there was legal necessity to support the alienations. No case has been made out in this appeal to persuade their Lordships to depart from the usual practice of not interfering with concurrent findings of facts.

In the result their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitors for the appellants: *Douglas, Grant and Dold.*

Solicitor for the respondent: *Harold Shephard.*

K. S. ——— *Appeals dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD ATKIN, LORD THANKERTON, LORD ROMER, SIR GEORGE RANKIN AND SIR SIDNEY ABRAHAMS.

State Aided Bank of Travancore, Limited .. *Appellants**

v.

Dhrit Ram .. *Respondent.*

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State Aided Bank of Travancore, Ltd. *v.* Dhrit Ram.

Contract—Fixed deposit with a bank in State of Travancore—Remittance in bank's account in another bank in Bombay—Place of contract and law applicable.

In September, 1936, plaintiff residing and permanently employed in Bombay wrote to the Bank (incorporated according to the laws of the State of Travancore and having apart from a branch in Cochin their head and only office at Alleppey) at Alleppey, asking for the rates of interest allowed on fixed deposits. On 5th September, 1936, the Bank wrote back stating that their then rates of interest for deposits of six months, one year, and two or more years were 4 per cent. 5 per cent. and 5½ per cent. respectively and that "Remittances may be made towards credit of our account with the National City Bank of New York, Bombay, and the same will be accepted by us at par, and interest allowed from the date on which credit will be afforded to our account at that end. Enclosed please find the necessary opening forms for fixed deposit account which please return duly completed and signed on remittance being made." On 1st October, 1938, the plaintiff paid Rs. 11,000 to the account of the bank in the National City Bank of New York, Bombay, filled up the Bank's opening form and wrote to the Bank at Alleppey enclosing the executed form and also the specimen signature card and requesting the issue of a fixed deposit receipt for two years in his name. On the 6th October, the Bank wrote enclosing the deposit receipt "with effect from the 1st inst." A similar transaction took place in March, 1937, when similar documents passed. Interest was paid by the Bank on four occasions at the fixed terms by sending the depositor a cheque on a Bank in Bombay and only in one case on the New York Bank. In March, 1938, when the second deposit became due the Bank was in difficulties and the Bank was putting off payment. Later, creditors' petitions were presented to the Travancore Court for winding up the Bank, while the Bank obtained time from the Court for the purpose of getting its approval to a scheme of arrangement. All proceedings against the Bank were stayed meanwhile. On 3rd March, 1939, the Court at Alleppey having before it proof of duly advertised meetings of creditors and that the scheme of arrangement had been approved by a majority of more than three-fourths in value of the creditors present in person or by proxy, approved the scheme and declared it binding on the Bank and all its creditors. In an action commenced by the plaintiff in Bombay on 15th December, 1938, to recover the amounts due to him and heard in July, 1939,

Held, that (*i*) the letter of 5th September, was merely a quotation of business terms and the contract was made by the offer by the plaintiff in the opening form accepted by the issue of the deposit receipt.

(*ii*) The place where the contract was made as well as the place where the contract was to be performed was Travancore and the law of that State governs the transaction.

(*iii*) Accordingly the plaintiff is bound by the scheme of arrangement which would afford a good defence to the action.

Appeal from a decree of the High Court in its appellate jurisdiction, on 13th March, 1940, affirming a decree of that Court in its ordinary original civil jurisdiction, of 20th July, 1939.

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*P.C.A. No. 5 of 1941. 6th November, 1941.

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D. N. Pritt and *R. J. T. Gibson* for Appellants.

Sir Thomas Strangman, K. C. and *S. P. Khambatta* for Respondent.

The Judgment of their Lordships was delivered by

Lord Atkin.—This is an appeal by the defendants from a decree of the Appellate Division of the High Court of Bombay affirming a decree of Wadia, J., in the High Court in favour of the plaintiff. The dispute involves a relatively simple question arising in the business of banking. The defendants, who will be called hereafter the Bank, are a company incorporated according to the laws of the State of Travancore and apart from a branch office in the State of Cochin have their head and only office at Alleppey in that State. They have no branches elsewhere. In September, 1936, the plaintiff, who resided and was in permanent employment in Bombay, wrote to the Bank at Alleppey asking for the rate of interest allowed on fixed deposit. On 5th September, 1936, the Bank wrote back stating that their present rates of interest for deposits of six months, one year, and two or more years were 4 per cent., 5 per cent., and 5½ per cent., respectively.

"Remittance may be made towards credit of our account with the National City Bank of New York, Bombay, and the same will be accepted by us at par, and interest allowed from the date on which credit will be afforded to our account at that end. Enclosed please find the necessary opening forms for fixed deposit account which please return duly completed and signed on remittance being made."

On 1st October, 1936, the plaintiff paid Rs. 11,000 to the account of the bank in the National City Bank of New York, Bombay, filled up the Bank's opening form, and wrote to the Bank at Alleppey enclosing the executed form and also the specimen signature card and requesting the issue of a fixed deposit receipt for two years in his name. The opening form is in the following terms:

Place: Bombay.
Dated 1st October, 1936.

The Manager,
The State Aided Bank of Travancore, Ltd.,
Alleppey.

Dear Sir,

Please receive the sum of Rupees eleven thousand only sent herewith as per detail below:

Cash.

Notes.

Cheque, Bills, etc.

11,000 credited to your account in the National City Bank of New York, Bombay.

Total Rs. 11,000.

as a fixed deposit re-payable 24 months after, bearing interest at the rate of 5½ per cent. per annum as per your rules and issue a receipt in the name

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of Mr. Dhrit Ram, Senior Auditor, Chief Auditor's Office, G.I.P. Railway, Bombay V.T. The specimen signatures are also attached.

Yours faithfully,

Signature: DHRIT RAM,

Full Address as given above.

If the deposit is in more than one name, please say if it is a joint or either survivor deposit.

Specimen Signature:
1. Dhrit Ram.
2. Dhrit Ram.
3. Dhrit Ram.

On 6th October the bank wrote enclosing the deposit receipt "with effect from the 1st inst." The deposit receipt is in the following form:

THE STATE AIDED BANK OF TRAVANCORE, LIMITED.

Interest to run from 1st October, 1936. and payable ½ yearly on 2nd July and 2nd January.

Deposit receipt.
Due on 1st October, 1936.

As of 1st October, 1936.

Rs. 11,000.

Received from Mr. Dhrit Ram, Bombay Rupees Eleven thousand only as a Deposit re-payable two years after date with interest at the rate of five and half per cent. per annum.

Seal.

Not Transferable.

No. 10|22.

For the Stated Aided Bank of Travancore, Ltd.

(Sd.).

Manager.

Ented, (*Sd.*)

Accountant.

Interest will cease at the expiration of two years when this receipt must be sent in for payment or renewal endorsed by the depositor. No notice will be issued by the Bank.

There was a difference of opinion in Bombay as to the documents constituting the contract, the trial Judge holding that the Bank's letter of 5th September was an offer accepted by the plaintiff by paying the money to the New York Bank and sending the opening form. The Chief Justice quite rightly thought that the letter of 5th September was merely a quotation of business terms, and that the contract was made by the offer by the plaintiff in the opening form accepted by the Bank by the issue of the deposit receipt. He therefore held, and their Lordships have no doubt rightly held, that the contract of deposit was made at Travancore. A similar transaction took place in March, 1937, when similar documents passed: the deposit in this case was for Rs. 4,000 for one year at 5½ per cent. Interest was paid by the Bank to the depositor on four occasions at the fixed terms by sending him a cheque on a bank in Bombay, only in one case on the New York Bank. In March, 1938, when the

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second deposit of Rs. 4,000 became due the Bank was in difficulties, and a correspondence followed, the plaintiff asking for payment, the Bank putting him off. Later, in 1938, creditors' petitions were presented to the Travancore Court for winding up the Bank, while the Bank obtained time from the Court for the purpose of getting its approval to a scheme of arrangement; all proceedings against the Bank were stayed meanwhile. On 3rd March, 1939, the Court at Alleppey having before it proof of duly advertised meetings of creditors and that the scheme of arrangement had been approved by a majority of more than three-fourths in value of the creditors present in person or by proxy, approved the scheme and declared it binding on the Bank and all its creditors. In substance the creditors were given fully paid preference shares of 50 rupees nominal value on the full amount due to them with an option to take 25 per cent. in cash and a charge on all the then assets of the Bank to secure the re-payment of their debts.

If the plaintiff is bound by the scheme of arrangement it would afford, as pleaded, a good defence to the present action, which was commenced in Bombay on 15th December, 1938, to recover the two sums of Rs. 11,000 and Rs. 4,000. There appears to have been no evidence before the Court as to the terms of the Bank's constitution as a company, as to the meaning of the State aid referred to in its title, or as to the provisions of the company law in Travancore. It is conceded, however, that by the law of Travancore the order of the Court makes the scheme of arrangement binding on all creditors wherever situate: and—apart from the question of jurisdiction of the Bombay High Court, which will be mentioned later—the only question argued in the Courts in India and before us was whether the contract between the parties was governed by Travancore law. Their Lordships therefore proceed to determine the case on this footing, and express no opinion on any question that might arise as to the effect of a scheme of arrangement valid by the law of the domicile of such a company as this. The law which governs a contract depends on the intention of the parties, express or implied. There is no intention expressed in these documents, and the Courts are left to infer the intention by reference to considerations where the contract was made and how and where it was to be performed. The learned Chief Justice, though he came to the conclusion that the contract was made at Travancore, was of opinion that it was to be performed, *i.e.*, discharged, at Bombay. Their Lordships cannot agree. With the greatest respect to the Chief Justice, he does not appear to have given sufficient weight to the fact that this is a banking transaction entered into at the only office of the Bank where in ordinary matters banking business of this kind has to be completed. The decisions in *Rex* v. *Lovitt*,[1] and in *Joachimson* v. *Swiss Bank Corporation*,[2] establish in the case of

1. (1912) A.C. 212.
2. (1921) 3 K.B. 110.

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fixed deposit and current account, respectively, where payment is to be made. In the present case the terms of the deposit receipt, which plainly form part of the contractual documents providing that the receipt must be sent in for payment, *i.e.*, to Travancore, point strongly to payment at Travancore where, it must be remembered, the books of the Bank are, and where the signature card is kept, and where any cross-claims by the Bank would be known. The Chief Justice appeared to think that because payment of the deposit was made to the Bank's agents in Bombay it was reasonable to hold that re-payment was to be made by the same means as the original payment. But in the meantime the depositor might have changed his residence to other parts of India, or abroad, and the Bank might have changed its agents in Bombay, or ceased to have any. It would seem remarkable that as a matter of legal right the Bank could refuse to repay the depositor at Travancore, or the depositor, if at Travancore, insist on being paid in Bombay. The initial quotation of business terms in the letter of 5th September, 1936, that remittance might be made to credit of the appellant Bank at the National City Bank of New York, and "will be accepted by us at par," can presumably only mean that the payment will be treated as a payment to the Bank at Travancore. The fact that the interest payments were made by a cheque on Bombay appears to have very little bearing. No doubt as a matter of banking facilities such payments would so be made, just as it is highly probable that if the Bank had continued a prosperous existence it would have paid off the deposits in a similar manner. But this throws no appreciable light on the strict legal position. When consideration is being given to the question, what law did the parties intend to govern the contract? It seems proper to bear in mind that the promisor is a bank incorporated under Travancore law with, apparently, some connection with the State of Travancore, and governed as to its business by any law of Travancore that may affect banking, including laws, if any, as to interest, limitations on borrowing, legal tender and the like. It seems highly improbable that such an institution would contemplate making contracts part of which would be governed by the law of Travancore and part by the law of the place of residence of its customers or debtors. But, whatever importance should be attached to this, their Lordships come to the conclusion that not only the place where the contract was made but also the place where the contract was to be performed was Travancore, and that the law of that State governs the transaction. The appellant, therefore, was protected by the terms of the scheme of arrangement. It has become unnecessary on this view to discuss the question of jurisdiction. It is, indeed, possible that the controversy between the parties might be resolved by reference to the Bank's rules, referred to in the opening form, and apparently, therefore, incorporated in the contractual terms whether the respondent saw them or not. But on the rules being tendered in evidence the trial Judge rejected them, but whether

because the respondent had not received them, or on the ground that they were not formally proved by any Bank witness to be the rules referred to, is not clear. No objection was taken to the Judge's decision, and the rules were not referred to in argument before the Appellate Division or this Board.

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Their Lordships will humbly advise His Majesty that the appeal be allowed, the decrees in the High Court be set aside, with costs, and that the suit be dismissed. The respondent must pay the costs of this appeal.

Solicitors for Appellants: *Luttey & Dawe.*

Solicitors for Respondent: *T. L. Wilson & Co.*

K. S. — *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD ATKIN, LORD THANKERTON, LORD ROMER AND SIR GEORGE RANKIN.

Commissioner of Income-tax, Bihar and Orissa .. *Appellant**

v.

Maharajadhiraj Sir Kameshwar Singh of Darbhanga .. *Respondent.*

P.C. — Commissioner of Income-tax Bihar and Orissa *v.* Maharajadhiraj Sir Kameshwar Singh of Darbhanga.

Income-tax Act (XI of 1922), *section* 10 (2) (ix)—*Assessee carrying on money-lending business—Suit against him for damages for failure to advance sufficient funds to borrower—Costs of defending—Right to deduction against assessable profits.*

A suit filed by the shareholders of a company against the assessee, a money-lender (who had already lent moneys to the company) for damages for an alleged failure to implement fully his promise to finance the company, must be treated as one in respect of his money-lending transaction with the company and the defence of such an action is essential for the full protection of his rights as the creditor in the amount already advanced to the company. Accordingly in view of the close connection between the loan and the alleged transaction the assessee is entitled to a deduction of the amount spent in defending the action as an allowance admissible under section 10 (2) (*ix*) of the Income-tax Act.

Appeal from a judgment of the High Court, dated 17th October, 1939, upon a reference made under section 66, sub-section (2) of the Indian Income-tax Act, 1922.

J. Millard Tucker, K. C. and *W. Wallach* for Appellant.

Roland Burrows, K. C. and *C. J. Colombos* for Respondent.

The Judgment of their Lordships was delivered by

Lord Thankerton.

LORD THANKERTON.—In connection with the assessment of the profits and gains of his business as a money-lender for the year 1931-1932, the respondent claimed the deduction of Rs. 2,07,018 expended in the year of account, as an allowance admissible under section 10 (2) (*ix*) Income-tax Act, 1922. The respondent's claim was rejected by the Income-tax Officer, the Assistant Commissioner of Income-tax and the Commissioner of Income-tax, the last of whom, at the request of the respondent, made a reference under section 66 (2) of the Act to the High Court of

*P.C. Appeal No. 27 of 1941. 12th December, 1941.

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Judicature at Patna, which decided the reference in favour of the respondent by a judgment dated 17th October, 1939, against which the present appeal has been taken by the appellant. The relevant provisions of section 10 of the Act are as follows:

"10. (1) The tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely:

* * * * *

(*ix*) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains...."

The expenditure sought to be deducted consisted of law charges incurred during the accounting year in connection with a suit for damages brought in 1926 by Major Anthony John and others, shareholders in the Agra United Mills Limited, against the respondent's father, the late Maharajadhiraja Sir Rameshwar Singh and several other defendants, for conspiracy, collusion, misrepresentation, breach of contract, etc. During the pendency of the suit, the late Maharajadhiraja died on 3rd July, 1929, and the respondent and his brother were substituted for their father. The suit was dismissed by the Court of the Additional Subordinate Judge of Agra on 26th February, 1931. The only question in the appeal is whether the expenditure in question was 'incurred solely for the purpose of earning' the profits or gains of the respondent's money-lending business. The respondent has continued the money-lending business carried on by his father. The question of law which was referred to the High Court was, "whether the cost in question is legally a business deduction or not?" After a scrutiny of the plaintiffs' allegations in the Agra suit of 1926, and the findings of the Agra Court which led to its dismissal, the appellant states in paras. 8 and 9 of his statement of case under S. 66 (2) of the Act.

"8. The only connection of the late Maharajadhiraja with the Agra United Mills Co., Ltd., was that he was a shareholder, and that he has advanced a loan of Rs. 10,00,000 to the Mill. For the latter the late Maharajadhiraja had brought a suit and obtained a decree in 1929. The expenses incurred in this latter suit have been allowed as expense incurred in the assessee's money-lending business. The Agra suit had no connection with any business of the assessee. He was involved in the suit because he happened to be a very rich man and was therefore liable to attack by unscrupulous persons to relieve him of part of his surplus cash.

Opinion of the Commissioner.

9. On the above findings of fact, it is respectfully submitted that the expense for defending the Agra suit was not a business expense, that is, it was not an expense incurred for earning any profits assessed to income-tax, and as such the assessee is not entitled to deduct the sum as a 'business deduction' against the assessable profits."

On 23rd November, 1927, the High Court passed an order which required a further statement from the appellant as to "Whether the money-lending business of the late Maharaja and the assessee is such as would have included transactions of the kind into which he was alleged to have entered with the United Agra Mills, Ltd." In response to a request by the appellant, the respondent fur-

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nished him with the details of six other transactions, which the respondent claimed to be comparable to the transaction now in question. Thereafter the appellant, on 22nd August, 1938, submitted a further statement of case relating to these six transactions in which he sought to distinguish these six transactions from the transaction here in question and answered in the negative the question put to him by the High Court. The appellant's reasons for distinguishing these six transactions will be referred to later. The learned Judges of the High Court held that the conclusion of the appellant could not be supported on the facts stated by him, and that the assessee was entitled to the deduction claimed by him. As the appellant had done, they scrutinised the plaint and the judgment in the Agra case, as providing the test for decision of the reference. Agarwala, J., stated:

"The contention that the suit against the late Maharaja was instituted against him not because he was a money-lender but because he was a wealthy nobleman is not, in my opinion, acceptable. It was because the late Maharaja lent money to the company that an opportunity was afforded to the plaintiffs to allege that the advance of 10 lakhs of rupees actually made was only a part performance of a contract the scope of which was very much wider. It was the relationship of money-lender and borrower which provided a foundation on which the allegations against the late Maharaja were based and the main purpose of the suit was to obtain damages for the breach of an alleged money-lending transaction."

Meredith, J., said:

"I agree with the view taken by my learned brother. The late Maharajadhiraja brought a suit for recovery of ten lakhs of rupees advanced to the Mill, a decree was obtained in 1929, and the assessee was allowed to deduct the expenses incurred in this suit as expenses incurred in his money-lending business. If spending money to recover this ten lakhs is treated as not being in the nature of capital expenditure, and incurred solely for the purpose of earning the profits or gains of the money-lending business, then I cannot see why money spent in defending a false claim arising out of the same transaction is not to be treated upon the same basis. Both suits were based upon the same transaction, namely, the advancing of the ten lakhs though no doubt very different versions of that transaction were given by the plaintiffs in each of the suits, the version of the plaintiffs in the suit against the Maharaja being almost completely false. That version might have been an almost completely false version of what took place, but it cannot be denied that it was built up upon the transaction in which the loan of the 10 lakhs was made. If the Maharaja was to show a profit upon this transaction, it was not only necessary for him to sue for recovery, but also to defend any false claims which might have been based on the transaction. Defence of such suits must be regarded, in my view, as a necessary though unpleasant part of the business of money-lending. I am satisfied that the suit was primarily against the Maharaja in his capacity as money-lender. and not merely as a rich nobleman, and it was based primarily too upon breach of contract by the money-lender."

In the opinion of their Lordships, the only right view as to the nature of the Agra suit is that expressed by the learned Judges of the High Court. It appears that the conclusion arrived at by the appellant was mainly based on his view that there was no connection between the late Maharaja's loan of Rs. 10 lakhs to the mills and the transactions alleged by the plaintiffs in the Agra suit. This view is expressed in para. 8 of the appellant's statement of case, and is repeated in his further statement of

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case in commenting on the six other transactions cited by the assessee. In reference to Nos. (*ii*) and (*vi*), he states:

"In both these cases the assessee found himself compelled to take over the businesses and run them on his own account in order to safeguard the money which he had previously invested in them; whereas in the case of the Agra United Mills, Ltd., there was no connection between the loan of Rs. 10 lakhs and the transaction into which he was alleged to have entered with the company. It will be seen that the former transaction is expressly disassociated from the latter in para. 39 (*d*) of the plaint in the civil suit."

In the opinion of their Lordships, the appellant has not sufficiently considered the relation of the paragraph to which he refers to the rest of para. 39. The opening sentences make clear that the loan of Rs. 10 lakhs (of which Rs. 8½ lakhs had already been advanced) was part of the promises made in the alleged agreement of 21st October, 1923 (see para. 34), under which the Maharaja was to finance the company, and the remainder of para. 39 is concerned with the alleged failures of the Maharaja to implement his promises and in crediting the Maharaja with oblique motives for his failure. The allegations of fraud, conspiracy, etc., were merely the extravagant embroidery which is commonly found in such actions; they do not alter the main character of the action as being directed against the late Maharaja as the money-lender, and the latter's defence to the action was just as essential for the full protection of his rights as the creditor in the loan of Rs. 10 lakhs as was his suit for the recovery of the loan. It has to be remembered that money is the stock in trade of a money-lender. The appellant might well have come to a different conclusion if he had realized the close connection of this loan with the transactions alleged in the Agra suit.

If it really added anything, their Lordships would agree with the High Court that at least three of the other transactions referred to in the appellant's further statement of case provide evidence that the alleged transaction with the Agra United Mills was not foreign to the money-lending business of the respondent and his father.

Their Lordships are therefore of opinion that the facts stated by the Commissioner cannot justify the opinion expressed by him, but that the expenditure in question was incurred solely for the purpose of earning the profits or gains of the money-lending business, and that the High Court were right in holding the respondent entitled to the deduction claimed, and in answering the question of law asked by the Commissioner in favour of the respondent.

Accordingly, their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the judgment of the High Court should be affirmed. The appellant will pay the respondent's costs of the appeal.

Solicitor for Appellant: *Solicitor, India Office.*

Solicitors for Respondent: *Hy. S. L. Polak & Co.*

K. S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

V. Kr. St. Kasi Visvanadan Chettiar .. *Petitioner** *(Plaintiff)*

v.

Devakottai Municipal Council through its Commissioner .. *Respondent* *(Defendant).*

Kasi Visvanadan Chettiar *v.* Devakottai Municipal Council.

Madras District Municipalities Act (V of 1920), *section* 354—*Scope—Suit to recover profession tax paid under protest—When barred.*

The plaintiff resided in Devakottai for the statutory period of sixty days during the half year though he exercised his business only at Tinnevelly and Madras during this period. When he was served by the Devakottai Municipal Council with an order to give his return of income for the purposes of assessment to profession tax, he stated that he had no income or profession liable to profession tax within the Municipal limits. But at the time he had not paid profession tax elsewhere in respect of the income in Madras and Tinnevelly and therefore would be liable to pay the tax at Devakottai under section 93 (1) (*a*) (*ii*) of the District Municipalities Act. He was served with a notice of demand on the 10th November, 1937, but by that date he had already paid profession tax in excess of the amount now demanded to the Madras Corporation on 10th October, 1937, so that under section 93 (4) of the Act he was not liable to pay again at Devakottai. An appeal by the plaintiff against the assessment order at Devakottai was summarily dismissed. In a suit to recover the amount of profession tax paid under protest by the plaintiff,

Held, that section 354 of the District Municipalities Act, having regard to proviso to sub-section (2), is not a bar to the suit as the refusal of the Municipal Council to grant the plaintiff relief in respect of the double taxation is clearly outside the provisions of the Act.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Devakottai, dated 18th June, 1940 and passed in Small Cause Suit No. 17 of 1940.

R. Gopalaswami Aiyangar and *A. M. Krishnaswami Aiyangar* for Petitioner.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition has been brought against the decision of the District Munsiff of Devakottai in Small Cause Suit No. 17 of 1940. That suit was brought to recover profession tax of Rs. 85 paid under protest by the plaintiff. The learned Munsiff found that the suit was not maintainable by reason of section 354 of the Madras District Municipalities Act.

The facts of the case present no difficulty. The plaintiff admittedly resided in Devakottai for the statutory period of sixty days during the half year in question and it is also admitted that he exercised his business only at Tinnevelly and Madras during this period. When he was served with an order to give his return of income for the purposes of assessment to profession tax, he stated that he had no income or profession liable to profession tax. This was not correct because, unless he had already

*C.R.P. No. 2123 of 1940. 27th March, 1942.

Kasi Visvanadan Chettiar *v.* Devakottai Municipal Council.

paid profession tax elsewhere in respect of the income in Madras and Tinnevelly, he would be liable to pay profession tax in respect of his business under section 93 (1) (*a*) (*ii*) of the Act. He was served with a notice of demand on the 10th of November, 1937, but by that date he had already paid profession tax in excess of the amount now demanded to the Madras Corporation on 10th October, 1937, so that under section 93 (4) of the Act he was not liable to pay again at Devakottai except in respect of any difference. The plaintiff preferred an appeal in which he denied having any income or profession within the municipal limits and he enclosed with his memorandum of appeal the receipt granted by the Madras Corporation for the payment of profession tax for the same half year. He did not specifically plead section 93 (4) but there can be no doubt that his reference to this payment indicated quite clearly that he was not liable for any further payment. His appeal was summarily dismissed without any attempt to arrive at any findings on the questions raised by the plaintiff. Although section 93 (4) was not open to the plaintiff when he was first called upon to make a return of his income, it was certainly open to him at the time the assessment order was served, but since the prior payment had not been notified to the Devakottai Municipality the assessment order cannot be criticized on that ground. The learned Munsiff has referred in his judgment to the fact that the plaintiff's income-tax papers were also produced before the Municipal Council at the time of his appeal so that there was ample material on which the Council could and should have found that the source of the plaintiff's income lay entirely outside the municipality and that he had already paid profession tax elsewhere. The refusal of his appeal under the circumstances was a purely arbitrary proceeding which cannot now be defended.

The only ground which has been urged against the plaintiff is that section 354 is a bar to his suit, but the argument overlooks the proviso to sub-section (2). The refusal of the Municipal Council to grant him relief in respect of the double taxation is clearly outside the provisions of the Act.

In the result the petition is allowed, the dismissal of the suit is set aside and the suit decreed for the plaintiff with costs throughout.

K. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

Dandamudi Narasayya and another .. *Appellants** (*Defts.*)

v.

Movva Subbayya and others .. *Respondents* (*Plffs.*).

Narasayya *v.* Subbayya.

Adverse possession—Rightful owner wresting possession from trespasser—Suit for establishing title—Possession within twelve years of suit

*L.P.A. No. 33 of 1941. 1st April, 1942.

—*Trespasser obtaining decree in suit under section 9, Specific Relief Act, 1877—Effect.*

The act of a person who takes possession, either forcibly or otherwise than in due course of law, may be high-handed and not legal in the sense that it is not authorised by law, but if he happens to be the rightful owner there is no justification for holding that the period during which he had both title and possession should not be taken into account for purposes of deciding whether he was in possession within twelve years of his suit. And the fact that the trespasser from whom he wrested possession had succeeded in a suit under section 9 of the Specific Relief Act will not make any difference in the position of the real owner so obtaining possession.

Appeal under Cl. 15 of the Letters Patent against the judgment and decree of Abdur Rahman, J., dated 17th February, 1941 and passed in S.A. No. 128 of 1938 preferred against the decree of the Court of Subordinate Judge of Masulipatam in A.S. No. 193 of 1936 (in O.S. No. 112 of 1933 on the file of the Court of the District Munsiff of Gudivada).

P. Satyanarayana Rao for Appellants.

V. Govindarajachari for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The only question in this appeal is one of limitation and we consider that it has been rightly decided by Abdur Rahman, J., from whose judgment this appeal has been preferred under Cl. 15 of the Letters Patent.

The suit was filed by the respondents for a declaration of title to certain immovable property in the Kistna District and a decree for possession and mesne profits. On the 4th May, 1915, the first appellant gave the property in suit to the first respondent who is his brother-in-law under a registered deed. Thereupon the first respondent and his brother, the second respondent, went into possession and remained in possession until the 16th July 1918, when the appellants entered upon the property. On the 9th February, 1930, the respondents asserted their title and dispossessed the appellants who within six months brought a suit under section 9 of the Specific Relief Act. As they established their possession within six months of the suit, a decree was passed in their favour. This resulted in the Court restoring possession to the appellants on the 4th September, 1931. The decree passed in favour of the appellants did not, of course, affect the question of title and the respondents were at liberty to file the suit out of which this appeal arises. This they did on the 24th November, 1931. The appellants raised three pleas in bar. In the first place they said that the deed of gift executed by the first appellant in favour of the first respondent was a nominal transaction and consequently the title remained in the first appellant. In the second place they averred that the respondents had not been in possession of the property within 12 years of the suit. In this connection they contended that the period from the 9th February, 1930 to the 4th September, 1931, should be ignored. In the third place they averred that they had acquired title by adverse possession.

The District Munsiff of Gudivada who tried the suit held that there had been no valid gift by the first appellant to the first respondent, that the respondents had not been in possession of the

Narasayya *v.* Subbayya.

Leach, C. J.

property within twelve years of the institution of the suit and that the plea of title by adverse possession raised by the defendants was well founded. Consequently he dismissed the suit. The respondents appealed to the Subordinate Judge of Masulipatam, who disagreed with the findings of the District Munsiff. The Subordinate Judge held that the gift was a real one and the deed valid, that the respondents had been in possession until the 16th July, 1918 and also from the 9th February, 1930, until the 4th September, 1931, and that the appellants had not established a title by adverse possession. The result was that the respondents' suit was decreed with costs. The appellants appealed to this Court, but without success, Abdur Rahman, J., agreeing with the findings of the Subordinate Judge.

Admittedly, if the Court can have regard to the entry of the respondents upon the property on the 9th February, 1930, the suit was filed in time. It is said, however, for the appellants that as they were successful in their suit under section 9 of the Specific Relief Act, the Court cannot have regard to what happened between the 9th February, 1930 and the 4th September, 1931. In rejecting this contention Abdur Rahman, J., observed that the act of a person who takes possession, either forcibly or otherwise than in due course of law, may be high-handed and not legal in the sense that it is not authorised by law, but if he happens to be the rightful owner there is no justification for holding that the period during which he had both title and possession should not be taken into account.

In this Court, Mr. Satyanarayana Rao relied on two cases, *Narayanan Chetty* v. *Kannammal Achi*[1] and *Rajagopalan* v. *Somasundara Thambiran*,[2] both of which were considered by Abdur Rahman, J. We agree with the learned Judge that they are not in point. In *Narayanan Chetty* v. *Kannammal Achi*,[1] the plaintiff was placed in possession of immovable property under a decree of the Court in the month of July, 1896. On appeal it was held that he had been wrongly placed in possession by the trial Court and in pursuance of the appellate decree he was dispossessed in 1898. He claimed that for the purpose of limitation his dispossession should be deemed to start from the date in 1898 when the appellate decree was enforced. This contention was however rejected. The Court considered that as he had been given possession under an erroneous decree of the Court the period of his possession should be ignored. In *Rajagopalan* v. *Somasundara Thambiran*,[2] the decision in *Narayanan Chetty* v. *Kannammal Achi* was approved.

This is not a case where the plaintiffs were placed in possession under an erroneous decree of Court. They went into possession of the property on the 9th February, 1930, on the strength of their own title to the property. The appellants were in possession as trespassers and the fact that they succeeded in the suit under section 9 of the Specific Relief Act did not make their

1. (1904) I.L.R. 28 Mad. 338.
2. (1906) 17 M.L.J. 149: I.L.R. 30 Mad. 316.

trespass any the less. They remain trespassers in spite of their decree.

In the course of his judgment Abdur Rahman, J., quoted the following passage from the judgment of Lord Selborne in *Lowe* v. *Telford*:[1]

"In the case also cited at the bar of *Jones* v. *Chapman*[2], it is accurately stated by Mr. Justice Maule, that 'as soon as a person is entitled to possession and enters in the assertion of that possession or, which is exactly the same thing, any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has the title is in actual possession and the other person is a trespasser. They differ in no other respects. You cannot say that it is joint possession; you cannot say that it is a possession as tenants in common. It cannot be denied that one is in possession and the other is a trespasser'. And in *Harvey* v. *Brydges*[3], it is pointed out that so far as relates to the fact of possession and its legal consequences it makes no difference whether it has been taken by the legal owner forcibly or not."

These observations have full force here. The respondents who are the rightful owners of the property were in possession of what belonged to them within 12 years of the suit and this being so, their suit was filed in time. A decree passed under section 9 of the Specific Relief Act is very different from an erroneous decree for possession based on title, as was the case in *Narayanan Chetty* v. *Kannammal Achi*.[4]

For these reasons the appeal will be dismissed with costs.

We note with regret that the trial of the suit took nearly five years in the District Munsiff's Court. There can be no excuse why a suit of this nature should have taken this length of time before it was brought on for hearing. The attention of the District Munsiff concerned will be drawn to this fact.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE ABDUR RAHMAN.

The Madura Municipal Council through its Commissioner, Mr. Rajiah D. Paul .. *Appellant** (*Deft.*)

v.

The Madura, Etc., Devasthanams represented by its Executive Officer, Mr. R. S. Nayudu .. *Respondent* (*Plff.*).

Madura Municipal Council v. Madura, etc. Devasthanams.

Madras District Municipalities Act (V of 1920), section 83—Property tax on shops and stalls within a temple—Commodities sold not used for worship—Purpose not subservient to religious worship in temple—Assessment justified.

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1. (1876) 1 A.C. 414.
2. (1849) 154 E.R. 717: 2 Ex. 821.
3. (1845) 153 E.R. 546: 14 M. & W. 442.
4. (1904) I.L.R. 28 Mad. 338.

*Appeal Nos. 293 and 302 of 1939. 27th October, 1941.

Madura Municipal Council v. Madura, etc., Devasthanams.

Where there were a large number of shops inside the compound of a temple in which all kinds of commodities were being sold and the commodities were not such as could only be used for purposes of worship in the temple or in other words, the shops or stalls were not being used only for purposes subservient to the worship in the temple,

Held, that since on a construction of section 83 of the District Municipalities Act, the shops and stalls concerned could not be said to be set apart for public worship and to have been actually used for that purpose only, the assessment of property tax on them was justified.

The Municipal Council, Palni v. *Sri Dandayuthapani Devasthanam, Palni*, (1940) 2 M.L.J. 897: I.L.R. (1941) Mad. 322, relied on.

Corporation of Calcutta v. *Moti Chand Chowdhury*, (1939) 1 M.L.J. 396: L.R. 66 I.A. 42: I.L.R. (1939) 1 Cal. 277 (P.C.), referred to.

Appeals against the decree of the Court of the Subordinate Judge (Principal) of Madura in O.S. No. 34 of 1938.

B. Sitarama Rao and *C. S. Rama Rao Saheb* for Appellant in App. No. 293 of 1939 and Respondent in App. No. 302 of 1939.

K. Rajah Aiyar and *T. A. Ramaswami Reddi* for Respondent in App. No. 293 of 1939 and Appellant in App. No. 302 of 1939.

The Judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.—This appeal arises out of a suit brought by the Madura Devasthanam against the Municipal Council, Madura, for a declaration that the building and lands described in the schedule annexed to the plaint were exempt from payment of the property tax to the defendant Municipality. The defendant Municipal Council justified the assessment in reply and contended that in so far as the items contained in the schedules were used for commercial purposes and could not be said to form a portion of the temple property, they could not be exempt from the payment of the tax. The learned Subordinate Judge of Madura held that the items covered by item 1 were not liable to be assessed but those described in items 2 and 3 were so liable. The Madura Municipal Council has preferred an Appeal (No. 293 of 1939) in regard to the items covered by item 1 and the Madura Devasthanam preferred the other appeal (No. 302 of 1939) in regard to the items described in items 2 and 3.

The only question therefore to decide in both the appeals is whether the shops and stalls inside the Madura temple were correctly assessed and were liable to pay the property tax. The view taken by the learned Subordinate Judge finds support from a decision of this Court reported in *The Municipal Council, Srirangam* v. *The Srirangam Devasthanam*,[1] but the matter was considered subsequently by one of us who referred the matter to a Bench and the decision of the Bench in *The Municipal Council, Palni* v. *Sri Dandayuthapani Devasthanam, Palni*,[2] was to the effect that as the power house, which had been assessed to property tax in that case, was being used for supplying electricity to shops

1. (1936) M.W.N. 1088.
2. (1940) 2 M.L.J. 897: I.L.R. (1941) Mad. 322.

Madura Municipal Council v. Madura etc., Devasthanams.

Abdur Rahman, J.

and hotels yielding a profit and was not being used for religious purposes alone, although the whole hill on a portion of which it was erected was set apart for religious purposes, it was liable to assessment of property tax.

Learned counsel for the Madura Devasthanam has, however, contended that in view of the decision of their Lordships of the Privy Council in *Corporation of Calcutta* v. *Moti Chand Chowdhury*,[1] the whole of the Madura temple and its adjuncts have to be treated as one unit for the purpose of exemption from taxation under section 83 of the Act and it would be incorrect to detach certain portions of the temple and consider them to be exempt from paying the property tax while holding others to be liable for the same. The decision of their Lordships of the Privy Council has, in our opinion, no application as it dealt with the question of valuation of the various buildings which had to be valued on a certain basis under section 127 of the Calcutta Municipal Act of 1923. We are not concerned in this case with the method of the valuation given in that Act but with the construction of section 83 of the District Municipalities Act.

That there are a large number of shops inside the compound of the Madura temple in which all kinds of commodities are being sold has not been disputed and as long as it is not possible to hold that those commodities were such as could only be used for purposes of worship in the temple or in other words, the shops or stalls were being used only for the purpose subservient to the worship in the temple, the contention of the Madura Devasthanam that the properties in which those goods were sold were not liable to taxation could not be upheld. The shops and stalls were, like the power house in *The Municipal Council, Palni* v. *Sri Dandayuthapani Devasthanam, Palni*,[2] being used for commercial as well as religious purposes and this makes them taxable. Since on the construction of section 83 of the District Municipalities Act, the items of property contained in item 1 could not be said "to be set apart for public worship" and could not be said to have been actually used for that purpose and no other, the judgment of the learned Subordinate Judge cannot be sustained.

In view of what has been said above, the appeal filed on behalf of the Madura Municipal Council must be allowed and the appeal preferred by the Madura Devasthanam dismissed. The appellants in Appeal No. 293 of 1939 will have their costs in respect of item 1 alone. No costs need be paid in Appeal No. 302 of 1939. The costs paid by the Madura Municipal Council to the Devasthanam will be refunded.

Appeal No. 293 *of* 1939 *allowed*
K. C. *Appeal No.* 302 *of* 1939 *dismissed.*

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1. (1939) 1 M.L.J. 396: L.R. 66 I.A. 42: I.L.R. (1939) 1 Cal. 277 (P.C.).
2. (1940) 2 M.L.J. 897: I.L.R. (1941) Mad. 322.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Nagappa Prabhu .. *Petitioner** (*Plaintiff*)

v.

Minor Chandrasekhara by guardian and mother Triveni *alias* Rukma Bai and others .. *Respondents* (*Defendants*).

Nagappa Prabhu v. Chandrasekhara.

Madras Village Courts Act (I of 1889), sections 13, 32, 68 and 69—Scope—Minor legal representative of defendant—If to be brought on the record—Dismissal of suit in the absence of both parties after death of defendant without bringing his legal representative on the record—Fresh suit competent under section 32.

Though section 13 of the Village Courts Act provides that no suit could be brought against a minor it does not say that on the death of a defendant after the institution of the suit, his minor legal representative could not be brought on the record.

Where the period of sixty days given in section 69 of the Act for bringing the legal representative on the record had not expired on the date when a suit was dismissed in the absence of parties under section 30 (1) of the Act by the Panchayat Court,

Held, that the plaintiff was competent to bring a fresh suit in the District Munsiff's Court under section 32 of the Village Courts Act.

The plaintiff has the option either to make an application to set aside the order of dismissal of the first suit or bring a fresh suit straightaway.

Obiter:—Even if the period of sixty days given under section 69 had expired on the date on which the suit was dismissed a second suit would have been competent.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Kundapur, dated the 23rd day of December, 1940 and passed in S.C.S. No. 349 of 1940.

K. Vittal Rao for Petitioner.

M. L. Nayak for Respondents.

The Court delivered the following

JUDGMENT.—A suit to recover a sum of Rs. 34-14-0 was instituted in the Panchayat Court of Shankaranarayana under the Madras Village Courts Act against one Gundu *alias* Narasimha Bhandari. It was dismissed on the 7th April, 1940, as the parties failed to appear before the Panchayat Court for a number of hearings. After the dismissal the plaintiff brought a suit for the same amount in the Court of the District Munsiff of Kundapur. But as Gundu had died by that time, the suit was instituted against his minor son Chandrasekhara and his widow Triveni. It was denied on their behalf that Gundu had any dealings with the plaintiff and it was contended that the suit was barred by limitation. But the District Munsiff overruled their contentions. A third contention was advanced on behalf of the defendants. It was to the effect that Gundu had died while the suit was pending before the Panchayat Court and as no application was filed on behalf of the plaintiff under sections, 68 and

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*C.R.P. No. 1450 of 1941. 8th April, 1942.

Nagappa Prabbu *v.* Chandrasekhara.

69 of the Madras Village Courts Act (I of 1889) (roughly corresponding to O. 22, r. 4, C.P.C.), a fresh suit for the same amount was not competent. There was no evidence on the record as to the date of Gundu's death. This is admitted by the District Munsiff in his judgment. But an admission seems to have been made by counsel for the plaintiff during his final arguments that Gundu had died some months before the date of the dismissal of the suit by the Panchayat Court. Assuming that to be the case, the District Munsiff came to the conclusion that it was incumbent on the plaintiff to have presented a petition under section 68 of the Act and inasmuch as no petition was presented to bring Gundu's legal representatives on the record, a fresh suit by the plaintiff for the same amount against Gundu's legal representatives was not maintainable.

Two grounds were urged in reply on behalf of the plaintiff before the District Munsiff. They have been repeated here before me. Firstly it was contended that it was unnecessary for him (*i.e.*, the plaintiff) to bring a minor legal representative on the record as no suit could be brought under section 13 of the Act against a minor in the Panchayat Court. There was and is no force in this contention although the District Munsiff was of the view that the suit would have had to be returned for presentation to the proper Court after the minor legal representative had been brought on the record. Section 13 of the Act provides that no suit could be brought against a minor; but it does not say that if a suit were brought against a person who was not a minor, a minor legal representative could not be brought on the record if that person happened to die after the institution of the suit. The second contention advanced on his behalf was that as the suit was really dismissed by the Panchayat Court on account of the absence of the parties, the plaintiff was competent to bring a suit under section 32 of the Village Courts Act. This was negatived by the District Munsiff. There can be no doubt that a plaintiff can bring a suit under that section if his suit were dismissed in the absence of parties under section 30 (1). It was however contended on behalf of the defendants and that contention prevailed before the District Munsiff, that as Gundu had died before the suit was dismissed, a second suit would not be competent and it was incumbent on the plaintiff to make an application to the Panchayat Court under sections 68 and 69 to bring the defendant's legal representative on the record. The District Munsiff proceeded on the assumption in accordance with the admission made by the plaintiff's counsel before him that Gundu had died some months before the suit was dismissed. Learned counsel for the petitioner had alleged before me that Gundu had died on the 19th February, 1940 and that the period of sixty days mentioned under section 69 of the Act had not expired on the date on which the suit was dismissed by the Panchayat Court. It is a pity that the District Munsiff had not recorded the statement of the counsel for there was no evidence of Gundu's death on the record. This should have been done. In view of the

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allegation as to the date of Gundu's death made before me I would have been inclined to send the case back for a fresh finding on the point. But as learned counsel for the respondents stated before me that his instructions were to the effect that Gundu had died on the 19th February, 1940, I consider it unnecessary to adopt that course. The position therefore is that on the date on which the Panchayat Court dismissed the suit the period of sixty days within which the application under section 69 had to be made had not expired and the suit was dismissed in the absence of the parties. It was contended on behalf of the defendant that it was not only open to the plaintiff to make an application to the Panchayat Court to bring the legal representatives of the deceased defendant on the record after the date of the dismissal but that was his only remedy and if he failed to avail himself of the same, a separate suit would not be maintainable. I am not impressed by that contention. There is nothing in the Act which could support the respondent. In fact the suit had been dismissed and unless the order of dismissal was set aside, an application by the plaintiff to bring the defendant's legal representatives on the record would not lie. But it is argued on behalf of the respondents that the plaintiff should have asked for the order of dismissal of suit to be set aside. There was nothing in the Act that made it essential for the plaintiff so to do. But even if the plaintiff had applied, where was the guarantee that the Court would have accepted the application? Had the Court declined to set the dismissal aside and to restore the suit, what would have happened? Would a second suit have been competent? If so, why? Why should the maintainability of a second suit be made to depend upon the Court's decision to set aside or not to set aside the order of dismissal of the suit? Once a suit is dismissed in the absence of the parties, two remedies are available to the plaintiff. He can make an application to the same Court to set aside the order of dismissal. If this application is accepted and the suit restored, he can proceed with the suit. But if this application is rejected, he can bring a fresh suit provided it has not become barred by limitation. He may however decide not to make an application for setting aside the dismissal and bring a fresh suit straightaway. Learned counsel for the respondents contended that as the defendant had admittedly died on the 19th February, 1940 and could not appear in Court after that date, the dismissal should be regarded as one in the absence of the plaintiff alone. This is not however correct. The suit was dismissed in the absence of parties. It is immaterial whether the absence was voluntary or involuntary, intentional or forced. Moreover the Court and for a matter of that the plaintiff according to his evidence did not actually know on or before the 7th April, 1940, that Gundu had died. Why should one therefore travel beyond the order passed by the Panchayat Court for the purpose of ascertaining the reasons which had led the parties to absent themselves? But in any case the period of 60 days had not expired when the suit was dismissed and it became impossible then for the plaintiff to make

the application to bring Gundu's legal representatives on the record, even if he had come to know of Gundu's death and decided to present an application for that purpose. I am for the above reasons clearly of opinion that a second suit was competent when the period of sixty days given in section 69 had not expired on the date on which the suit was dismissed. It is unnecessary in this case to decide whether a fresh suit would have been maintainable even if the period of sixty days had expired on the date on which the suit was dismissed by the Panchayat Court, although as at present advised and for the reasons that I have given, I am inclined to take the view that a fresh suit would have even then been competent.

Since the other questions had been decided by the District Munsiff in favour of the plaintiff, this revision must be accepted and a decree for the amount passed with costs in both the Courts in favour of the plaintiff against the defendants. They will be liable to the extent of the assets received by them from Gundu.

K. S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Arunagiri Chettiar .. *Appellant** *(Deft.)*

v.

Kuppuswami Chettiar .. *Respondent* *(Plff.)*.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 7, 9 *and* 12 *—Payments and appropriations for interest after the Act came into force —Appropriations exceeding amount payable as provided in section* 12, *proviso—Re-appropriation to principal—When permissible.*

Where payments made by a debtor in 1938 and 1939, were definitely appropriated towards interest at the time when they were made, neither the debtor nor the creditor has the right to tear up the appropriations by an unilateral act. The Court has no power to re-appropriate the payments to principal in the absence of any provision for the same in Act IV of 1938. It is not sufficient to show that the creditor cannot by reason of the provisions of section 7 recover more than the amount as scaled down under the Act. The only way in which a debtor might get back money which he has paid towards interest after the Act came into force in excess of the amount properly due under the provisions of the Act would be by establishing a right to a refund under the ordinary law on the ground that the payment was made under a mistake. For that purpose when the creditor sues for the balance there must be a definite plea of set off supported by evidence showing that a mistake was in fact made.

Appeal against the decree of the District Court of North Arcot at Vellore in A.S. No. 336 of 1939 preferred against the decree of the Court of the District Munsiff of Tirupattur in O.S. No. 268 of 1939.

T. R. Ramachandran for Appellant.

V. T. Rangaswami Aiyangar and *K. Ramaswami* for Respondent.

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*S.A. No. 912 of 1941. 29th July, 1942.

Arunagiri Chettiar v. Kuppuswami Chettiar.

The Court delivered the following

JUDGMENT.—The appellant was the defendant in a suit on a promissory note executed for Rs. 1,400 on 4th June, 1936. The question in appeal arises under sections 9 and 12 of Madras Act IV of 1938. The appellant made payments totalling Rs. 210 before the Act came into force. These payments were more than the amount due for interest as scaled down under section 9. They were definitely appropriated to interest and there can be no question of any refund. After the Act came into force, the appellant made a payment of Rs. 100 towards interest on 24th September, 1938, and another payment on 12th April, 1939, of which Rs. 320 was appropriated to interest and Rs. 30 to principal. These two payments for interest are very considerably in excess of the amount of interest as scaled down under section 12 to 6¼ per cent. per annum.

It is argued in appeal that, granted that there can be no refund of excess payments after re-appropriation in the manner laid down in section 9, there is no provision in section 12 prohibiting the ordering of a refund by the creditor, such as we find in sections 8 and 9; and that under section 7, the general rule is laid down that no sum in excess of the amount as scaled down shall be recoverable from the debtor. It seems to me that it is not sufficient to show that the creditor cannot recover more than the amount as scaled down. The fact is that he has recovered more than the amount of interest as scaled down and the only question is whether the appellant can compel him to pay back the excess or to submit to a re-appropriation towards principal. The two payments in 1938 and 1939 were definitely appropriated towards interest at the time when they were made. Neither the debtor nor the creditor has the right to tear up these appropriations by an unilateral act. The Court has no power to re-appropriate the payments to principal unless the Act contains a provision for such re-appropriation. I am not aware of any such provision in Act IV of 1938. To my mind the only way in which a debtor might get back money which he has paid after the Act came into force in excess of the amount properly due under the provisions of the Act, would be by establishing a right to a refund under the ordinary law on the ground that the payment was made under a mistake. For this purpose there must be a definite plea of set off supported by evidence showing that a mistake was in fact made. No such plea has been taken in this case nor is there any such evidence of the circumstances of the payments.

I therefore hold that the excess amount paid towards interest as scaled down cannot be recovered by the powers of sections 7 and 12 of Act IV. This position is not so unreasonable as it might seem, for there are many cases in which the question whether the debtor or is not an agriculturist is extremely doubtful and if in such cases the defendant voluntarily makes a payment at the contract rate of interest without thinking of availing himself of a possible remedy under Act IV of 1938, there is no apparent reason why he should necessarily be allowed to

claim a refund of the excess over the interest as scaled down. The appeal is therefore dismissed with costs.

Arunagiri Chettiar *v.* Kuppuswami Chettiar.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Venkitaswami Naicken and others .. *Accused** 1 to 3.

Venkitaswami Naicken *In re.*

Criminal Procedure Code (V of 1898), sections 380 and 562—Magistrate to whom matter is referred under section 562 should under section 380 either pass sentence or make order but not acquit accused.

Section 562, Criminal Procedure Code, applies only to convicted persons; so where under the proviso to that section a matter is referred to the Sub-Divisional Magistrate to pass the necessary orders, he should proceed in the manner provided by section 380 and pass a sentence or make an order; he cannot set aside the conviction and acquit the accused.

Case referred for the orders of the High Court under section 438, Criminal Procedure Code, by the Sessions Judge of Coimbatore Division in his letter, dated 31st December, 1941, No. 98|6-8.

Accused not represented.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The police charged four persons with the theft of a calf or, in the alternative, of an offence punishable under section 411 or section 414, Indian Penal Code. All the four accused were convicted by the Stationary Sub-Magistrate of Udumalpet. He sentenced the third accused to a substantial term of imprisonment; but he thought that as the other three accused had not before committed any offence, they might well be released under section 562, Criminal Procedure Code. As the Magistrate had no powers to pass orders under section 562, Criminal Procedure Code, he referred the matter under the proviso to that section to the Sub-Divisional Magistrate to pass the necessary orders. The Sub-Divisional Magistrate instead of doing this acquitted the accused 1, 2 and 4. The Sessions Judge has referred the matter to this Court, expressing his opinion that the Sub-Divisional Magistrate acted illegally and without jurisdiction.

There can be no doubt that the Sessions Judge was correct. Section 562, Criminal Procedure Code, applies only to convicted persons, as can be seen from the very wording of that section. It begins with the words "when any person not under 21 years of age is convicted of an offence. . . ." Further, the proviso begins "Provided that where any first offender is *convicted* by a Magistrate of the third class. . . ." When a reference is made under section 562, Criminal Procedure Code, the Magistrate to whom it is referred has to proceed as in the manner provided by section 380. Section 380, Criminal Procedure Code, relates only to the passing of a sentence or making of an order and does not empower the Sub-Divisional Magistrate to set aside a conviction. The section does say that "if the Magistrate 'thinks'

*Crl.R.C. No. 68 of 1942. 5th March, 1942.
(Case Referred No. 5 of 1942).

Venkitaswami Naicken, *In re.*

further enquiry or additional evidence on any point to be necessary, he may make such enquiry or take such evidence himself. . . ."; but that has been interpreted in *Public Prosecutor* v. *Gurappa Naidu*,[1] as giving the Sub-Divisional Magistrate power to make further enquiries so that he may decide whether or no it is a fitting case for the passing of an order under section 562 Criminal Procedure Code or whether, on the other hand, he ought to impose some substantial sentence under the Penal Code.

Ordinarily, an order passed without jurisdiction should be set aside and the Magistrate ordered to continue the proceedings from the point where the illegal order was passed; but upon hearing the Public Prosecutor, I think, that perhaps this might unduly harass the three accused, against whom evidence is very little. I agree with the Sub-Divisional Magistrate that they should have been given the benefit of the doubt. I do not therefore think it necessary to accept the reference. It is rejected.

K. C. *Reference rejected.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Valavala Pattabhiramayya .. *Petitioner* (Accused).*

Valavala Pattabhiramayya, *In re.*

Criminal Procedure Code (V of 1898), section 540—Power of appellate Court to ascertain what transpired in the trial Court and examine record of procedure adopted by him—Pronouncement of judgment should be in accord with that signed by Court.

An appellate Magistrate is entitled to ascertain what transpired in the trial Court and examine the record of its procedure. Section 540, Criminal Procedure Code, gives very wide powers to all Courts at any stage in any proceeding to examine witnesses if such evidence appears necessary for a just decision of the case.

A pronouncement that is not in accord with the signed judgment is not a pronouncement of the judgment and has no validity; consequently a Magistrate who makes a slip in pronouncing judgment can correct it subsequently.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate, Narsapur, dated 23rd June, 1941, and passed in C.A. No. 26 of 1941 (C.C. No. 2872 of 1940, Stationary Sub-Magistrate, Narsapur).

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The Stationary Sub-Magistrate of Narsapur found the petitioner guilty of an offence punishable under section 325, Indian Penal Code and sentenced him to three months' rigorous imprisonment and to a fine of Rs. 100 with a further three months' imprisonment in default. That conviction and the sentence were confirmed in appeal.

It was alleged in the grounds of appeal that when the Sub-Magistrate pronounced judgment he said that the accused had been sentenced to a fine of Rs. 100 and to a term of three months' simple imprisonment in default and that on the following day he

1. (1933) 65 M.L.J. 405: I.L.R. 57 Mad. 85.

*Cr.R.C. No. 534 of 1941. 10th October, 1941.
(Cr.R.P. No. 503 of 1941).

re-called the accused and told him that he had been sentenced to three months' rigorous imprisonment also. In view of the nature of this allegation, the appellate Magistrate summoned the Sub-Magistrate and recorded evidence from him as to the circumstances under which the judgment was delivered. I agree with the learned advocate for the petitioner that this evidence cannot be regarded as evidence contemplated by section 428, Criminal Procedure Code; but it was certainly open to the appellate Magistrate to ascertain by report or otherwise what transpired in the Magistrate's Court; for it was necessary for him to do so in order to properly dispose of the appeal before him. Every Court has an inherent power to put on record an account of the procedure adopted by it. Even if the appellate Court had had no power of summoning the Sub-Magistrate, the Sub-Magistrate was entitled to put on record what he did and the appellate Magistrate was entitled to ask him to do so and to examine that record to ascertain what procedure had been adopted. Moreover, section 540, Criminal Procedure Code, gives very wide power to all Courts at any stage in any proceeding to examine witnesses if such evidence appears to be necessary for a just decision of the case. There was therefore nothing wrong in the Sub-Divisional Magistrate's enquiring what procedure had been adopted in the trial Court.

Valavala Pattabhi ramayya, *In re.*

It is next argued that a Magistrate who makes a slip in pronouncing judgment cannot correct it and that the only remedy is to get the conviction and sentence set aside and a fresh trial ordered. It would be an absurd anomaly if that were so. Fortunately, it is not. It is necessary for the Magistrate to write a judgment and to pronounce that judgment. A pronouncement that is not in accord with the signed judgment is not a pronouncement of the judgment and has no validity.

The learned advocate for the petitioner has half-heartedly suggested that the Magistrate was not speaking the truth. I should be sorry to think that he was not. The manuscript copy of the judgment shows that the accused was sentenced to three months' rigorous imprisonment and to a fine of Rs. 100 with three months' imprisonment in default. As there was twice mention of three months' imprisonment, the Magistrate may easily have inadvertently omitted to mention one of them. He also points out in his judgment the necessity for a deterrent sentence; but a fine of Rs. 100 is certainly not a deterrent sentence for an offence which is punishable with seven years' rigorous imprisonment. I find no reason to suspect that the judgment on record is not the judgment originally written by the Sub-Magistrate.

The last point made on behalf of the petitioner is that the doctor who first examined the complainant has given evidence for the accused and deposed that the complainant told him that he had sustained the fracture of his arm by a fall. Both the Courts disbelieved the evidence of that witness for reasons given by them. There being concurrent findings on that point, this Court must accept them as correct.

The petition is consequently dismissed.

K. C. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Govindan son of Thimma Chetty of Wellington .. *Petitioner** (1*st Accused*).

Govindan, *In re.*

Cantonment Act (II of 1924), section 118-I (a) (ii)—Offence punishable under—Form of order.

In a summary trial for an offence of using threatening and abusive or insulting words punishable under section 118-I (*a*) (*ii*) of the Cantonments Act, though it is not necessary that the Magistrate should record what the prosecution witnesses actually said, it is however necessary in convicting the accused to give a brief statement of the reasons. Such a statement of reasons would necessitate at least a short summary of what the prosecution witnesses had said, so as to indicate that the evidence had made out the case with which the accused had been charged and also that the Magistrates had believed that evidence. If there was defence evidence, it would further be necessary to say why they preferred the evidence of the prosecution to that of the defence.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Bench of Magistrates of Wellington, dated 18th December, 1941, and made in Summary Case No. 186 of 1941.

K. V. Ramaseshan for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor for the Crown.

The Court made the following

ORDER.—The petitioner has been sentenced to pay a fine of Rs. 25 for an offence punishable under section 118-I (*a*) (*ii*) of the Cantonment Act of using threatening, abusive or insulting words; and he has also been bound over for a period of two years.

As it was a summary trial it was not necessary that the Magistrates should record what the prosecution witnesses actually said; but it was necessary in convicting him to give a brief statement of the reasons. It can hardly be said that the Magistrates have done that. All they have said is "We have heard both sides at length and unanimously . . . convict Govindan (Petitioner)". A brief statement of their reasons would necessitate at least a short summary of what the prosecution witnesses had said, so as to indicate that the evidence had made out the case with which the accused had been charged, and also an indication that the Magistrates had believed that evidence. If there was defence evidence, it would further perhaps be necessary to say why they preferred the evidence of the prosecution to that of the defence.

The Magistrates have also not made it clear what the petitioner's case was, except to say that he admitted that there was quarrelling.

It is also not clear how the Magistrates came to the conclusion that the petitioner had been previously convicted; for he denies this. The Magistrates could act on previous convictions only if they had been proved or if the accused had admitted them. The

*Crl.R.C. No. 197 of 1942. (Crl.R.P. No. 184 of 1942). 9th July, 1942.

last two sentences in the order under section 106, Criminal Procedure Code, rather suggest that the police had asserted from the Bar that the accused had been previously convicted, rather than that the accused himself admitted it.

As in addition to the fine—which is not unreasonable—the accused has been bound over for a long period with very substantial sureties, I think that this case should be tried again.

The conviction and sentence and the order under section 106 are therefore set aside and a retrial ordered.

K. S. *Petition allowed and retrial ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Saradambal Ammal and another .. *Petitioners** (*Defendants*)

v.

T. C. Kuppusami Sastrigal .. *Respondent* (*Plaintiff*).

Hindu Law—Joint family—Coparcenary consisting of two minor brothers with mother as guardian—Acknowledgment by mother after attainment of majority of one of the brothers—If can save limitation as against the minor coparcener.

A promissory note was executed by a mother on her own behalf and as guardian of her two minor sons who were members of an undivided Hindu family. Various payments were made by her from time to time and endorsed on the note and the last of such payments was on 9th October, 1937. The elder son attained majority in 1930. In a suit on the note filed on 9th September, 1940,

Held, that as there can be no separate guardian in respect of a minor's interest in joint family property, the only person who can bind him by a valid acknowledgment is the manager of the joint family and the mother's acknowledgment cannot operate to save the suit from limitation against the minor son.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the District Munsiff of Mannargudi in S.C.S. No. 409 of 1940.

K. V. Ramachandra Aiyar for Petitioners.

A. V. Viswanatha Sastri for Respondent.

The Court delivered the following

JUDGMENT.—Two questions have been argued in this appeal: first, that the suit is barred by limitation so far as the third defendant is concerned, and, secondly, that the payments made have been wrongly appropriated by the lower Court towards interest though they were made towards principal and interest without any specific appropriation to principal or interest.

The facts so far as they are material for the first question may be briefly stated. The promissory note on which the suit was brought was executed by the first defendant on her own behalf and as the guardian of her minor sons defendants 2 and 3 who were members of an undivided Hindu family. Various payments were made by the first

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*C.R.P. No. 335 of 1941. 20th March, 1942.

Saradambal Ammal v. Kuppusami Sastrigal.

defendant from time to time and endorsed on the note, and the last of such payments was on 9th October, 1937. The suit was filed on 9th September, 1940. The second defendant who was the elder attained majority in 1930, and it was held by the lower Court that payments subsequently made by the first defendant could not bind him as valid acknowledgments or part payments and that accordingly the suit was barred by time as against him. But the Court held that as the Defendant 3 was still a minor, the payments by the first defendant who was the guardian of her minor son was a valid acknowledgment and saved the suit from limitation so far as he was concerned.

It is argued for the petitioner that this view is wrong as, after the second defendant attained majority, he became the manager of the joint family and he alone was competent to make valid acknowledgments or part payments so as to bind the Defendant 3, and that the Defendant 1 had no authority to do so as the liability of the third defendant was only in respect of his share of the joint family properties. It is well established law that in respect of a minor's interest in the joint family properties the manager of the family alone can bind the minor within certain well recognised limits, and that no guardian of property can be appointed or recognised. See *Gharib-ul-lah* v. *Khaluk Singh*[1] and *Bindaji* v. *Mathurabai.*[2] It is therefore difficult to see how the Defendant 1 could by her acknowledgment or part payment bind the Defendant 3 after 1930.

Mr. Viswanatha Sastri for the respondent contended that section 21, Limitation Act, specifically empowered lawful guardians of minors to make valid acknowledgments or part payments, and that inasmuch as the provision does not say that the lawful guardian must be the guardian of the minors' property the acknowledgment by Defendant 1 who was the lawful guardian of Defendant 3 must be held to be a valid acknowledgment. He placed reliance on the Full Bench decision reported in *Karinagisetti Chennappa* v. *Karinagisetti Onkarappa,*[3] holding that for purposes of section 21, the father or the mother alone can be the lawful guardian of a Hindu minor. I do not think that the decision has any application here as it dealt with a case of a minor having separate property of his own of which his grandmother claimed to be the guardian. Surely, where a minor has separate guardians for his person and for his property it cannot be said that an acknowledgment by the guardian of his person falls within section 21 of the Act. The section clearly contemplates the guardian of the minor's property making acknowledgments on his behalf. If so, as there can be no such guardian in respect of a minor's interest in his joint family property, the only person who can bind him by a valid acknowledgment can be the manager, and Cl. (*b*) of sub-section (3) of section 21 makes provision for such cases. Mr. Viswanatha Sastri has not been able to bring to my notice a single case where a guardian's acknowledgment of liability has been held to bind a minor in respect of a liability enforceable against his interest in joint

1. (1903) L.R. 30 I.A. 165 at 170: I.L.R. 25 All. 407 (P.C.).
2. (1905) I.L.R. 30 Bom. 152.
3. I.L.R. (1940) Mad. 358.

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family properties. I therefore hold that the Defendant 1's payment after the Defendant 2 attained majority cannot operate to save the suit from limitation against the Defendant 3.

On the second question it is no doubt true that it has been held that mere payment towards the principal and interest of a debt is not a payment specifically appropriated to either principal or interest. But on the facts of this case, the parties must be taken to have proceeded on the footing that the payments were to go in reduction of the interest so far as there was any interest due and the balance was to be applied towards the principal. On any other view no amount would remain outstanding after 1st October, 1934, but payments still continued to be made and the creditor issued a demand Ex. C. on 20th June, 1935, calling upon the Defendant 1 to "pay balance of principal and interest remaining due after deducting the payments made." This conduct of the parties is consistent only with an intention that the payments were first to be appropriated towards the interest and the balance to the principal. The decision of the lower Court on this point is therefore right.

The civil revision petition is allowed so far as the second petitioner is concerned. He will have his costs here and below. As against the first petitioner the civil revision petition is dismissed with costs.

Petition allowed.

K. S. *so far as second petitioner is concerned.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Izaradar R. Muniswami Goundan and another .. *Petitioners** *(Plaintiffs)*

v.

A. K. Hanumantha Roya Goundar .. *Respondent* *(Defendant).*

Muniswami Goundan v. Hanumantha Roya Goundar.

Madras Agriculturists' Relief Act (IV of 1938), section 15—Assignee of right to collect jodi on inam lands within a Zamindari—If a 'landholder'—Arrears of jodi due to the assignee—If can be scaled down either as 'rent' or 'debt' under the Act.

'Jodi' is rent according to the definition in the Agriculturists' Relief Act; an assignee of the right to collect jodi is not however a landholder according to the definition in the Madras Estates Land Act and since that which can be scaled down under section 15 of Act IV of 1938, is rent payable to a landholder under the Madras Estates Land Act, this section will not cover that which is rent under Act IV of 1938, but is not payable to a landholder as defined in the Madras Estates Land Act. The payment being in the nature of rent will not be a debt and therefore it cannot be scaled down under any provision of Act IV of 1938. The anomaly relates to a substantive relief and can be rectified only by the Legislature.

Petitions under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decrees of the Court of the District Munsiff of Tirupattur, dated 21st December, 1939 and made in S.C.S. Nos. 262 and 307 of 1938, respectively.

T. R. Srinivasan for Petitioners.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondent.

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*C.R.P. Nos. 867 and 868 of 1940. .. 19th February, 1942.

Muniswami Goundan v. Hanumantha Roya Goundar.

The Court delivered the following

JUDGMENT.—This civil revision petition raises a somewhat curious point under Act IV of 1938. It arises out of a small cause suit brought by the present petitioner as assignee from a Zamindar of the right to collect jodi on inam lands within the Zamindari. The defendant pleaded that he was entitled to the benefits of the Madras Agriculturists' Relief Act and sought to scale down the arrears under section 15 of that Act. This plea was met by a contention that the plaintiff was not a landholder under the Madras Estates Land Act and that therefore the jodi could not be scaled down. A landholder under the definition in the Madras Estates Land Act includes a person entitled to collect the rents of the whole or any portion of an estate by virtue of any transfer from the owner. The term 'rent' under the Madras Estates Land Act does not include jodi, although the same term when used in the Madras Agriculturists' Relief Act does include jodi. The lower Court has held that because 'rent' as defined in Act IV of 1938, includes jodi, the tenant who pays that rent to an assignee from a landholder is entitled to the benefit of section 15 of the Act. A similar contention with reference to rent payable to an assignee from a jenmi under the Malabar Tenancy Act was rejected by a Bench of which I was a member in the case of *Ahmad Koya* v. *Appu*.[1] In that decision it was pointed out that the terms 'Jenmi' and 'intermediary' as defined in the Malabar Tenancy Act, do not include an assignee of the right to collect rents and although the omission of any provision for the scaling down of rent due in Malabar to an assignee from the Jenmi may well be a lacuna under the Act, the Act being an expropriatory measure, its language could not be extended so as to expropriate more persons than those actually affected by its terms. It seems to me that the position is exactly the same with reference to an assignee of the right to collect jodi. 'Jodi' is rent according to the definition in the Agriculturists' Relief Act, but an assignee of the right to collect jodi is not a landholder according to the definition in the Madras Estates Land Act and since that which can be scaled down under section 15 of Act IV of 1938 is rent payable to a landholder under the Madras Estates Land Act, this section will not cover that which is rent under Act IV of 1938, but is not payable to a landholder as defined in the Madras Estates Land Act. No doubt the result is anomalous, for the payment being in the nature of rent will not be a debt and therefore it cannot be scaled down under any provision of the Act. But as remarked in the case already cited, it is the function of the Legislature to fill up the gaps in the Act and this is especially so in so far as they relate to substantive relief and not to mere matters of procedure. In this view I allow the revision petition and give the plaintiff a decree as prayed with costs here and in the Court below.

The connected civil revision petition No. 868 of 1940, arises out of a suit by the Zamindar himself and it is dismissed with costs.

K. S. *Petition No.* 867 *of* 1940, *allowed.*

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1. (1940) 2 M.L.J. 935.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

R. Padmanabha Chetty, Perumal and Company .. *Petitioner** (*Accused*).

Padmanabha Chetty *In re.*

Madras Prevention of Adulteration Act (III of 1918), *section* 5, *Cl.* (1) (a) *and* (b), *rr.* 28 *and* 29—*Adulteration of butter—Figures given by analyst—Value.*

The Reichert Wollny and Saponification values, etc., found on tests by the analyst of sample butter notwithstanding that they are abnormally low for pure butter do not ensure beyond all reasonable doubt that they are quite inconsistent with the purity of the sample. Abnormality in the Reichert Wollny numbers does not necessarily mean adulteration.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Second Presidency Magistrate of the Court of Presidency Magistrates, George Town, Madras, dated 2nd January, 1942, and passed in Municipal Case No. 432 of 1941.

V. Rajagopala Mudaliar for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The petitioner has been convicted by the Second Presidency Magistrate of selling adulterated butter and thereby committing an offence punishable under section 5, cl. (1) (*a*) and (*b*) of the Madras Prevention of Adulteration Act, read with rr. 28 and 29 under the same Act. He has been sentenced to pay a fine of Rs. 100.

The prosecution case rests entirely on the evidence of the Corporation Analyst, with the figures that he gave for certain tests carried out by him and more important still, the inferences which he drew from the figures obtained. The accused examined on his side a gentleman who has had some experience of analytical work under the Bombay Government; and fortunately the figures that he obtained upon analysis were very much the same as those given by the Government Analyst in so far as the tests conducted by these two gentlemen were the same. The Government Analyst conducted four tests. He estimated the Reichert Wollny value, the Refractive Index, and the Saponification value; and he then calculated from the Reichert Wollny number and the Saponification value the Juckenack and Pasternack value. D.W. 1 estimated the Reichert Wollny value and the Saponification value and the Refractive Index. He did not calculate the Juckenack and Pasternack value; but he carried out three other tests to estimate the Polensky value, the Iodine value, and the Phytosteryl Acetate number. The Reichert Wollny value for the specimen in question was found to be 21·8 by the Corporation Analyst and 21·91 by D.W. 1. The Refractive Index was found to be 1·4549 and 1·4545 by these two gentlemen respectively. The Saponification values found by them were 216·9 and 217·8 respectively.

*Cr.R.C. No. 139 of 1942. 16th July, 1942.
(Cr.R.P. No. 129 of 1942).

The Corporation Analyst deposed that the Reichert Wollny number varies in Madras from 28 to 40 for buffalo's milk and from 25 to 35 for cow's milk; so that the value obtained for this particular specimen was considerably below the minimum which he considered to be consistent with its being pure cow or buffalo's fat. The Refractive Index, he says, varies from 1·4525 and 1·4565. The Refractive Index of the specimen in question was found to be 1.4549, which lies about half way between these two extremes. This in itself is merely a negative result; for the Refractive Index can be easily manipulated by balancing the kinds of fats that are used in adulteration. The Saponification value was found to be 216·9, whereas the lower limit which the Corporation Analyst considers to be consistent with the purity of the specimen is 219. It is thus seen that both as regards the Reichert Wollny value and the Saponification value the specimen gave results which the Corporation Analyst considered could not be obtained from pure butter, whether obtained from cow's milk or buffalo's milk. He estimated that the degree of adulteration was 20 per cent., which percentage he obtained by subtracting the Reichert Wollny number from the minimum permissible, *viz.*, 28, and calculated the difference as a percentage of 28. The purport of D.W. 1's evidence is that in practice the Bombay Government did not prosecute unless the Reichert Wollny number fell below 19 and that as this sample was not below 19 and the Saponification value was not unduly low, especially having regard to the lowness of the Reichert Wollny number, with which it increases or decreases, it was unsafe to assume that the specimen was not pure butter.

There is no doubt in my mind that the figures found for this specimen of butter were abnormally low for pure butter. Reference was made here in the argument to the discussion of these tests in a number of text-books, such as, Warburton's "Chemical Technology," Analysis of Oils, Fats, and Waxes by Lewkowitsch, Bolton's 'Oils, Fats and Fatty Foods,' Woodman's 'Food Analysis', Allen's "Commercial Organic Analysis," and Thorpe's "Dictionary of Applied Chemistry." All these treatises indicate that the normal Reichert Wollny value and Saponification value are what are considered reasonable for a pure specimen by the Corporation Analyst. Allen states that in some tests that were made of ghee made from butter produced from the mixed milk of buffaloes collected from various dairies in different parts of India, the minimum Reichert Wollny value found in any specimen was 29, and the lowest Saponification value 226, as against the figures of 21·8 and 216·8 for the specimen in question. Of 357 samples examined by Thorpe, the average Reichert Wollny number was about 28·5 and the average Saponification value about 228. Bolton, at page 117, says that the Saponification value usually falls between the limits of 226 and 232. Wherever lower numbers were found, the results are referred to in the text-books as abnormal.

The prosecution rely on a test which does not find much mention in the text-books, and which is known as the Juckenack

Padmanabha Chetty *In re.*

and Pasternack test. The Juckenack and Pasternack number is obtained by subtracting 200 from the Saponification number and deducting the figure so obtained from the Reichert Wollny number. It is stated in Thorpe and Woodman that the limits for that number lie between +4·25 and —3·50, whereas the figure obtained for the present specimen was slightly higher than the upper limit, namely, 4·9. There is however little discussion of this test even in these two books and none at all in the others. I would therefore prefer not to express any opinion on the significance of the number (4·9) found for this specimen. It may however be noted that some of the specimens of butter tested by Thorpe had a Juckenack and Pasternack number as high as +5·6.

Although the Reichert Wollny and Saponification values of the specimen are abnormal for pure butter, the text-books make frequent references to instances in which very much lower numbers were found; and most books emphasise the very wide limits between which the Reichert Wollny and Saponification numbers vary. In the table given by Thorpe for his examination of the 357 samples above referred to, seven specimens had numbers as low as 22·5 and 219·9 respectively, while ten were as high as 32·6 and 232·5. Although it is said at p. 814 of Lewkowitsch that in the case of ghee prepared from the milk of Indian buffaloes, T. K. Ghose found Reichert Wollny values ranging from 29·2 to 42 with an average of 34·5, and that it was proposed that 28 should be regarded as the reasonable minimum Reichert Wollny value, yet some specimens examined by Browning and Parthesarathy gave figures as low as 21. In a table at p. 835 of Lewkowitsch are found values as low as 17. The learned counsel for the appellant relies above all on figures found in a paper contributed to a series of Government publications entitled "Memoirs of the Department of Agriculture in India". The title of the contribution is: "variations in some characteristics of the fat of buffalo and cow milk with changes in season and feeding" by F. J. Plymen and A. R. Padmanabha Aiyar. Connected with it is an article entitled "The mutual applicability of the analytical figures for butter, fat and ghee". Various animals or groups of animals were examined by the contributors, and a herd of buffaloes, described as the Telenkheri herd, were found to give very low Reichert Wollny and Saponification numbers, the former falling as low as 18·72 and the latter as low as 212·1. Even the highest number in this series of examinations does not approach the minimum standard which the Corporation Analyst considers consistent with the purity of the sample. The fact that the defence relied on a contribution as old as this one which was in 1921, is however an indication, I think, of the abnormality of the figures for this Telenkheri herd. Many such researches must have been made since 1921; but apparently no later figures have given the support to the accused that these particular figures give. We do not know whether the writers of this paper are authorities on the subject; and I should be rather reluctant to attach undue importance to their figures, were they not rendered probable by the fact that very low figures are not infrequently obtained in all

parts of the world. So while it is certain that the figures in the sample are abnormal for pure butter, it is difficult to be sure beyond all reasonable doubt that these figures are quite inconsistent—even in Madras—with the purity of the sample.

It has been pointed out that it is almost certain that the butter from which the sample was taken was a mixture of butters from various cows and herds and probably not all from the same villages, and that it is therefore most unlikely that abnormally low figures would be found for such a mixture. It is true that if butter with abnormally low Saponification and Reichert Wollny numbers is mixed with a large number of other butters, the average for the whole mixed butter is likely to depart only very slightly from normal; but we have not the material before us to know the exact extent to which the butter from which the sample was taken is a mixture of various butters. We do not know from where the butter came, or the characteristics of the cows or buffaloes or herds from which the milk was taken. It is also possible, though perhaps not very probable, that the accused was unfortunate in that the samples were taken from a part of the bulk which represented butter of a cow or herd bearing abnormally low values.

The prosecution rely on a case reported in *Grande Venkata Ratnam* v. *Corporation of Calcutta*,[1] in which the prosecution had proved that certain samples of ghee were adulterated. The figures for the samples in that case were: Reichert Wollny Nos. 26·6 and 24·9; Butyro—Refractive Index Nos. 44 and 45; Saponification Nos. 222 and 220. Further, a colour test for adulteration with a vegetable oil gave positive results in three out of four trials. The prosecution point out that in that case, where the learned Judges accepted the contentions of the Corporation Analyst, the Reichert Wollny and Saponification numbers were appreciably higher than those in this case; but two other tests were applied in that case which also indicated that the ghee was adulterated. The Refractive Index was there abnormal, whereas in the present case it is normal. Further, a delicate colour test was applied which indicated positively the presence of vegetable oil, not a natural constituent of butter. Any abnormality of the Reichert Wollny and Saponification numbers is sufficient to arouse an analyst's suspicions and to lead him to carry out other tests. If they also indicate that the ghee was adulterated, then the result of all the tests might put the matter beyond all possible doubt. Unfortunately, an abnormal Reichert Wollny number is in pure butter associated with an abnormally low Saponification number; for the Reichert Wollny number depends on the quantity of volatile fatty acids, such as Butyric Acid, while the Saponification number depends upon the total quantity of volatile and non-volatile fatty acids; and abnormality does not necessarily mean adulteration.

Both the prosecution and the defence have stressed the necessity for the laying down of a reasonable standard by the Government, such as has been laid down in other provinces. The reason

1. (1920) I.L.R. 47 Cal. 633.

Padmanabha Chetty, *In re.*

why the Government of Madras has not done so is doubtless the difficulty in fixing a reasonable number, as the above analysis has shown. If too low a number is fixed, then it tends to give legislative approval to a high degree of adulteration. On the other hand if the number is high, a few pure butters and ghees could not be sold. It is however clear from the various text books that the Reichert Wollny number is considerably influenced by the conditions under which the animals live; and in most cases the Reichert Wollny number can be raised to any reasonable standard that may be laid down by the Government by modifying somewhat the living conditions of the animals and by not using for the preparation of buttermilk secreted towards the end of lactation. Even if keepers of herds did not do this, very little hardship would be caused by the Government's fixing a number in the neighbourhood of 30; for very few genuine butters would be excluded. On the other hand, the danger of having such a low number as 19, which has been adopted in some provinces, would be that a vendor of butter could very appreciably adulterate his butter without very much risk to himself; for Courts would be inclined to feel, in the absence of strong evidence by the prosecution to the contrary, that if that particular standard was reached, the accused would be entitled to an acquittal. In the Calcutta case above referred to, the Court suggested that the figure of 30 for the Reichert Wollny number was reasonable; and it appears that that number was adopted soon afterwards by the Government of Bengal, although they subsequently reduced it from 30 to 28. 28 is the figure which the Corporation of Madras has for a considerable time regarded as the minimum consistent with the purity of the butter examined, and it would seem inadvisable to fix the number below that figure. In India, most butters are made from buffalo milk, which has appreciably higher numbers (10 to 12 per cent. higher at least) than cow's butter.

Although, therefore, it is very probable that the accused did adulterate his butter with an appreciable percentage of foreign fat and oil, yet I do not consider that it has been proved beyond all reasonable doubt that the accused was guilty of the offence with which he was charged.

The appeal is allowed and the fine ordered to be refunded.

K. S. — *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN, SIR CHARLES CLAUSON AND SIR MADHAVAN NAIR.

P.C.

Secretary of State *v.* Sri Narain Khanna.

Secretary of State .. *Appellant**

v.

Sri Narain Khanna .. *Respondent.*

Land Acquisition Act (I of 1894), section 15—Building on land held on cantonment tenure—Resumption of land by Government—Acquisition of building—Assessment of compensation—Principles.

In respect of land held by a person on cantonment tenure the Government retain the power of resumption at any time on giving one month's notice.

*P.C. Appeal No. 21 of 1941. 19th March, 1942.

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If they give that notice they are required to pay the value of such buildings as may have been authorised to be erected. The correct principle that should be applied in valuing under the Land Acquisition Act such a building apart from the site is to ascertain the costs of reproducing the buildings at the time of the compulsory acquisition allowing for depreciation in consideration of the age and condition of the buildings, and for the cost of necessary repairs and there is no room for assessing upon an assumed rental basis the compensation for the value of the buildings as materials standing upon a site, but liable to be removed at any moment.

J. Millard Tucker and *W. Wallach* for Appellant.

Respondent *Ex parte.*

The Judgment of their Lordships was delivered by

Sir Madhavan Nair.

SIR MADHAVAN NAIR.—This appeal arises out of certain land acquisition proceedings. The property concerned consists of a house and outhouses belonging to the respondent situate within the Meerut Cantonment. The land on which it stands was held by him from the Government on what is commonly known as the cantonment tenure. Grants to individuals of lands within cantonments are regulated by General Order of the Governor-General in Council, No. 179, dated 12th September, 1836, which has been repeated in a series of subsequent regulations. Their Lordships had occasion to consider the nature of the cantonment tenure in a land acquisition case which came before the Board recently in *Hari Chand* v. *Secretary of State*[1] from the Peshawar Cantonment. In that case their Lordships observed that:

"Where the Government grant any rights to individuals within the area of the cantonments, one of the cardinal conditions is that the Government retain the power of resumption at any time on giving one month's notice. If they give that notice they are required to pay the value of such buildings as may have been authorized to be erected."

In this case the property of the respondent had been in the possession of the Secretary of State on a lease for ten years at Rs. 325 a month, with a covenant to repair on the part of the tenant. The lease began on 1st July, 1931, and rent had been paid by the Government up to 10th May, 1934. In the meanwhile, the Government of India gave notice of resumption to the owner, resumed the land and instructed the Government of the United Provinces to acquire the buildings under the Land Acquisition Act, I of 1894, for the public purpose of housing Government officers. Their Lordships think it will be advantageous to state at the outset that though various questions were raised before the lower Courts the learned counsel for the Secretary of State, the appellant, has presented for their Lordships' consideration only one question, namely, what is the correct principle that should be applied in valuing under the Land Acquisition Act, a building which stands on land belonging to another and not to the owner of the building, as in the present case. The respondent has not been represented but Mr. Tucker has placed fully before their Lordships all the relevant facts and arguments.

The Land Acquisition Officer awarded to the respondent as compensation for the buildings Rs. 11,605 together with Rs. 1,659-12-0 for compulsory acquisition under section 15 of the Act. Dissatisfied with this award, the respondent claimed a refe-

1. (1939) 2 M.L.J. 722: L.R. 66 I.A. 258 (P.C.).

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rence in the ordinary course. The District Judge estimated from the evidence that the value of the buildings if newly constructed would be Rs. 30,858. From this amount he deducted Rs. 8,042 for depreciation. Government's claim for reduction of a further amount representing what it would have cost to bring the buildings into a reasonable state of repair, was disallowed by him for reasons which it is not now necessary to examine, as the point was not taken in appeal to the High Court by the Secretary of State; and his learned counsel has merely brought it to their Lordships' notice in the course of summarizing the conclusions of the District Judge. Deducting the amount of depreciation the District Judge held that the respondent is entitled to Rs. 22,816 together with the usual 15 per cent. allowance for compulsory acquisition and also interest at 6 per cent. on the excess amount from the date of the award to the date of his order. On appeal by the respondent the value of the buildings was increased to Rs. 31,426. The High Court arrived at the figure by capitalizing the annual rental of the buildings at 8 1|3 years' purchase, the Court deciding that 12 per cent. per annum simple interest may be taken to be a reasonable interest to expect from house property. This principle has thus been given effect to as stated, in the judgment:

"No doubt this lease was made by the appellant under the impression that he was the owner of the land of the compound, trees, plunge bath, polo pit, none of which he in fact owns. But still we think that the lease should be taken into account as Government was bound to carry out its obligations under the registered lease. There were seven years, one month and 20 days of the lease to run from 10th May, 1934, till 30th June, 1941. At Rs. 325 per month this comes to Rs. 27,843. The further period to make up 8 1|3 years' purchase (at 12 per cent.) is one year, two months and 10 days. For this, we think that in view of the materials of the house and the fact that the appellant does not own the ground, etc., a fair rent would be Rs. 250 a month. At Rs. 250 per month the total rent for one year two months and 10 days comes to Rs. 3,583. Adding these two sums we get Rs. 31,426 for the 8 1|3 years' purchase."

In this appeal by the Secretary of State, it is contended that the basis of valuation adopted by the High Court is incorrect, and that the true principle of assessing compensation for the buildings, apart from the site, is to ascertain the costs of reproducing the buildings at the time of the compulsory acquisition, allowing for depreciation in consideration of the age and condition of the buildings, and for the cost of necessary repairs. This principle was adopted as correct by this Board in *Hari Chand* v. *Secretary of State*,[1] already referred to, where it is enunciated as the correct principle. In that case, at page 262 their Lordships state it as follows:

"The subject to be valued being a building apart from the site, the principle of fixing value by ascertaining the cost of reproducing the building at the present time and then allowing for depreciation in consideration of the age of the building and for the cost of such repairs as might be required apart from depreciation is quite a well known and recognized method of valuing buildings for the purpose of compensation. That method was pursued here, and that method is not, as their Lordships conceive it, affected by the resumption notice, because the prices which would be taken and were taken, in this case, for the purpose of ascertaining the cost of reproducing the building would not be affected by the resumption notice at all."

1. (1939) 2 M.L.J. 722: L.R. 66 I.A. 258 (P.C.).

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Although the learned Judges of the High Court agreed with the District Judge that the land was the property of the Government and that the Secretary was entitled to resume it without paying any compensation therefor, and that the only compensation due was compensation for the buildings, which alone were compulsorily acquired, they would appear to have thought that they were entitled to assess this latter compensation on an assumed rental basis and for that purpose to take into account the lease, which they said "should be taken into account as Government was bound to carry out its obligations under the registered lease." It is clear that the lease was subject to the right of resumption by the Government, unless it could be maintained that the Government were not entitled to exercise the right of resumption during the currency of the lease, but the learned Judges agree that the land has been validly resumed, and it necessarily follows that, as from the date of resumption, the respondent ceased to have any right to keep the buildings on the land or to claim rent from a tenant, and there is no room for assessing upon an assumed rental basis the compensation for the value of the buildings as materials standing upon a site, but liable to be removed at any moment. In their Lordships' opinion, the District Judge has applied the correct principle in valuing the buildings in this case. The result is that their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the District Judge's decree should be restored. The appellant will get the costs of this appeal and also his costs in the High Court.

Solicitors for Appellant: *Solicitors, India Office.*

Respondent *Ex parte.*

K. S. ——— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE SOMAYYA.

Amirthammal and others .. *Appellants**
(Applts. 1 to 3 Defts. 3 to 5)

v.

Vallimayil Ammal .. *Respondent*
(Respt. Plff.).

F.B.

Amirthammal *v.* Vallimayil Ammal.

Hindu Law—Succession—Congenital idiot—Whether can marry—Transmission of heritable blood—Status of coparcener retained—Issue of idiot entitled to succeed.

It is a fundamental rule of Hindu Law that a son born to a member of a joint family has on birth the right to share in the family estate. The fact that the son is born with an affliction which disqualifies him from enjoying his share does not rob him of his birth right. The affliction merely prevents his enjoyment of the right while the affliction lasts.

A congenital idiot has the status of a coparcener notwithstanding that he is excluded from the enjoyment of his share during the period of his disqualification and he can lawfully marry and transmit a right of enjoyment of the family properties to his issue.

*S.A. No. 844 of 1938. 2nd April, 1942.

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Krishna v. *Sami*, (1885) I.L.R. 9 Mad. 64 (F.B.), approved.

Muthusami Gurukkal v. *Meenammal*, (1918) 38 M.L.J. 291: I.L.R. 43 Mad. 464 and *Pudiava Nadar* v. *Pavanasa Nadar*, (1922) 43 M.L.J. 596: I.L.R. 45 Mad. 949, (F.B.), referred to.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Appeal No. 103 of 1936 (A.S. No. 62 of 1936, District Court, Ramnad) preferred against the decree of the Court of the District Munsiff of Ramnad in O.S. No. 565 of 1934.

A. Swaminatha Aiyar, R. Ramamoorthy Aiyar and *S. Thyagaraja Aiyar* for Appellants.

K. Bhashyam Aiyangar and *R. Viswanathan* for Respondents.

The Court delivered the following Judgments:

Leach, C.J.

The Chief Justice.—The question raised in this appeal is whether a congenital idiot has the status of a coparcener notwithstanding that he is excluded from the enjoyment of his share.

The following genealogical tree will assist in the appreciation of the facts:

Veerakumara Pillai—Vallimayil Ammal
(died 1912) (died 1917)

Chellakrishna—Amirthammal (died 1934) (Deft. 3)
Two sons (dead) and one daughter.

Karuppayee—Subbiah Pillai (Died 1926)

Karthikeyan (a minor) (Deft. 5)
Mangalathammal (Deft. 1)
Ponnumuthammal (a minor) (Deft. 2)

Maruthu—Chellam Pillai (Died 1924)
Vallimayil Ammal (a minor) (Plaintiff)

Veerakumara Pillai's son Chellakrishna was a congenital idiot, but his father married him to Amirthammal and by her he had two sons and a daughter. Both the sons were born after the death of Veerakumara Pillai in 1912, but both of them had died by 1917. It has not been suggested that either of them was similarly afflicted. Veerakumara Pillai left a will, dated the 13th February, 1912, by which he bequeathed all his property, which was ancestral, to his widow, to whom he gave full powers to alienate. Veerakumara Pillai had also two daughters, Karuppayee and Maruthu. His widow died in 1917, the younger daughter in 1924 and the elder daughter in 1926. The elder daughter was survived by a son and two daughters, who are respectively the 5th, 1st and 2nd defendants in the suit. The younger daughter had a daughter, who is the plaintiff.

The suit was instituted in the Court of the District Munsiff of Ramnad for a decree for partition of the property which Veerakumara Pillai had left to his widow and the delivery to the plaintiff of a half share. Her case was that her grandmother had obtained an absolute estate under the will of her grandfather and

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that on the death of her aunt, Karuppayee, in 1926, the property devolved by the right of inheritance on her and the 1st and the 2nd defendants. The claim was contested by the 3rd, 4th and 5th defendants. They averred that Chellakrishna was not a congenital idiot and that the will left by Veerakumara Pillai was invalid. The District Munsiff and the Subordinate Judge of Ramnad on appeal held that Chellakrishna was a congenital idiot and this finding is now conclusive. The District Munsiff also held that the will was valid and the Subordinate Judge again agreed with him. The appeal is from the decree of the Subordinate Judge and the appellants are the 3rd, 4th and 5th defendants.

If Chellakrishna was in law a coparcener with his father, the latter admittedly had no right to bequeath the property held by him to his widow, because in such circumstances, it would constitute the joint property of the father and the son. The answer to the question whether Chellakrishna was a coparcener depends, according to the decision of this Court in *Krishna* v. *Sami*,[1] on whether he was capable of transmitting heritable blood, and therefore it will be necessary to consider whether a congenital idiot can lawfully marry.

In order to decide this appeal the Court is called upon to examine certain of the ancient texts and the reported decisions quoted to the Court in the course of the arguments. The most important of the texts are to be found in chapter II, section 10 of the Mitakshara. In placitum 1 Vijnaneswara quotes the following text of Yajnavalkya as an exception to the rule of succession "of the son, the widow and other heirs",

> "An impotent person, or outcast and his sons, one lame, a madman, an idiot, a blind man, and person afflicted with an incurable disease, and others (similarly disqualified), must be maintained, excluding them, however, from participation."

In placitum 2, 'an idiot' is defined as a 'person deficient in understanding, meaning one incapable of discriminating good from bad'. In placitum 3 we find this statement,

> "Manu likewise ordains, 'Impotent persons and outcasts are excluded from a share of the heritage; and so are persons born blind and deaf as well as mad men, idiots, the dumb and those who have lost a sense.'"

Placitum 5 reads as follows:

> "Those persons are excluded from participation. They do not share the estate. They must be supported by an allowance of food and raiment only; and the penalty of degradation is incurred, if they be not maintained. For Manu says, 'But it is fit, that a wise man should give all of them food and raiment without stint to the best of his power; for he, who gives it not, shall be deemed an outcast'. 'Without stint' signifies 'for life'."

The words "those persons" with which this placitum commences refer to the persons described in placitum 1 as being excluded from participation.

Placitum 7 makes it clear that when the disqualification is removed the right of participation follows. It is in these words:

> "If the defect be removed by medicaments or other means at a period subsequent to partition, the right of participation takes effect, on the same

1. (1885) I.L.R. 9 Mad. 64 (F.B.).

principle on which 'when the sons have been separated, one, who is afterwards born of a woman equal in class, shares the distribution' is based.''

The placita which have bearing on the rights of the sons of disqualified heirs are placita 9, 10 and 11 which read as follows: Placitum 9:

''The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds: *'But their sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects'.*"

Placitum 10:

"The sons of these persons, whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares; provided they be faultless or free from defects which should bar their participation, such as impotency, etc.''.

Placitum 11:

''Of these the impotent man may have issue of the wife; the rest may have legitimate progeny likewise. The specific mention of 'legitimate' issue and 'offspring of the wife' is intended to forbid the recognition of other sons".

Placitum 149 of the Sarasvati Vilasa also has an important bearing, but it is not necessary to quote the whole of it. In explaining the doctrine of exclusion as stated by Manu the commentator states:

"*Jatyandhabadhirau.* From this coupling together, (*a*) it follows that they have shares, but that they should, though having shares, be supported as they could marry. From the use of the word 'tadha' (similarly), the secret meaning is that the lame, etc., if capable of the sacrament of marriage take shares, and should be maintained.''

''*Unmaththajadamukascha.* From this grouping together, it follows that they also should be maintained and do not take shares, it must be understood if they are not worthy of marriage."

The term *Jatyandhabadhirau* has been translated as 'congenital blind and deaf' and the term *Unmaththajadamuka* as 'insane, idiot and dumb'. The translations of the ancient texts which I have quoted are those given in Setlur, and for the purposes of this case they have been accepted as being accurate, except the word 'not' in the last line of the passage quoted from Sarasvati Vilasa has been omitted.

It will be observed that according to Vijnaneswara an idiot, together with other afflicted persons, is excluded from participation in the property of the family while he remains afflicted, the right of participation arises when the disqualification is removed, and an afflicted person is capable of transmitting to his offspring the full rights of a coparcener, if the offspring is not afflicted, notwithstanding that his father remains afflicted. Whether the texts should be read as laying down that a congenital idiot is a coparcener with his rights suspended during the period of his affliction, or whether his rights as a coparcener only commence when his disqualification is removed is another matter and must be decided in the light thrown by the reported decisions, which I will now proceed to examine.

The first case and the most important of the reported decisions of this Court is that in *Krishna* v. *Sami*,[1] which was heard

1. (1885) I.L.R. 9 Mad. 64 (F.B.).

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by a Bench of five Judges. The plaintiffs' grandfather, one Sami Reddi, the father of the 1st defendant, and the grandfather of the 2nd and 3rd defendants were undivided brothers. The plaintiffs' father was born deaf and dumb, and the plaintiffs were born after the death of their grandfather. They claimed to be entitled to a share in the family estate as it stood in the lifetime of their father. The District Munsiff held that the plaintiffs were not entitled to sue as they were born after the death of their grandfather, and in support of his ruling relied on the decisions of the Calcutta High Court in *Pareshmani Dasi* v. *Dinanath Das*,[1] which was decided by a Bench and *Kalidas Das* v. *Krishan Chandra Das*,[2] which was decided by a Full Bench. On appeal, the Subordinate Judge reversed the decision of the District Munsiff and the 1st and 2nd defendants appealed to this Court. Their contentions were: (1) that as the plaintiffs' father by reason of his affliction could not inherit and as their grandfather had died before they were born, they acquired no right by birth in the family estate, and (2) that the property having devolved upon the defendants by right of inheritance before the plaintiffs were born their subsequent birth could not divest the defendants of their right to any portion of the property. This Court agreed with the Subordinate Judge that the Calcutta decisions were inapplicable, being decisions under the Dayabagha law, and held that under the Mitakshara law the sons of a deaf and dumb member of an undivided Hindu family are entitled to a share of the estate in the lifetime of their father, notwithstanding that they were born after the death of their grandfather, and that in such a case the estate vests on the death of the grandfather in the qualified heirs, subject to the contingency of its being divested on the recovery of the disqualified brother or the birth of a qualified heir. The judgment of the Court was delivered by that eminent Chief Justice of this Court, Sir Charles Turner, who examined with great care all the texts bearing on the questions raised in the appeal. Turner, C.J., pointed out that the decision in *Kalidas Das* v. *Krishan Chandra Das*,[2] proceeded mainly on two grounds. First, on the rule that an estate once vested in a full and absolute owner cannot be divested, and secondly, on an inference drawn from the texts of the Mitakshara which declare that a disqualified person whose disqualification is removed after partition is entitled to share in like manner as an after-born son. Turner, C.J., then observed:

"Analogy is intended to illustrate and not to limit. The analogy between the case of the disqualified person and the case of the after-born son is incomplete if the opinion of the Calcutta High Court be adopted, and the true meaning of the analogy appears to be explained by the author of the Sarasvati Vilasa. There are classes of disqualified persons who cannot be relieved of their disqualification and cannot transmit heritable blood; there are classes who, though they may be unable to be relieved of their disqualification, are capable of transmitting heritable blood. Their right to share in the family wealth is latent, or may come into existence at a future time as it does in the case of the after-born son. When it comes into existence, either in the person of the formerly disqualified heir or of his son, it is to be recognised. If capable of transmitting heritable blood they are share takers

1. (1868) 1 Beng.L.R.A.C. 117.
2. (1869) 2 Beng.L.R. 103 (F.B.).

though not at the time share enjoyers. If the son of a disqualified person is born in his grandfather's lifetime and his father dies, he is at once entitled to be recognised as a member of the coparcenary; the only ground for depriving him of that right, if his father dies after the grandfather's death, is insistence on the rule against divesting an estate once vested.''

Turner, C.J., proceeded to point out that the rule prohibiting the divesting of an estate once vested in a full owner cannot be laid down without exception, in respect of property governed by the Mitakshara law, and concluded his judgment with this statement,

"The existence of a valid power creates a potentiality of inheritance, which may be likened to that of a son in the womb. The estate is taken conditionally. It is difficult to distinguish these cases from that of the disqualified share taker, who may afterwards become qualified to demand possession or who may beget a qualified son.''

Hindu law makes no difference between a person who is born deaf and dumb and a congenital idiot. In the judgment in *Krishna* v. *Sami*,[1] it is clearly laid down that a disqualified person who is capable of transmitting heritable blood is a share taker, although not while his disqualification lasts a share enjoyer. He only becomes a share enjoyer when the disqualification is removed, but he can transmit a right of enjoyment of the family properties to his issue and it matters not whether the issue is born before or after the grandfather's death. The Court is asked to ignore *Krishna* v. *Sami*,[1] but this cannot be done unless it is manifest that it has been overruled by the Privy Council or must be regarded as an obsolete decision, for which I can see no warrant.

In *Muthusami Gurukkal* v. *Meenammal*,[2] the Court had to consider the position in a case of supervening insanity. It was held that the right of a member of a joint Hindu family to share in ancestral property is a right which comes into existence at birth and is not lost, but is only in abeyance, by reason of an affliction which carries with it disqualification. Consequently, on the death of all other members of the joint family the disqualified member takes the whole of the property by survivorship. In delivering the judgment of the Bench, Seshagiri Aiyar, J., said:

"If the exclusion is not based on original sin or subsequent incapacity to offer oblations and the like, the suggestion that it was due to a belief in the inability of the heir to manage temporal affairs appears more plausible. Very likely the rule is an outcome of a hazy notion that the property should be preserved for the disqualified person by those who are related to him. The law as to guardianship has developed much in later days. Even now it is not perfect. It looks as if the old lawgivers by providing for maintenance did not intend to deprive the heir of his inheritance, but only to provide for its management during incapacity.''

Seshagiri, Aiyar, J., discussed the question further in the light of what is stated in the Sarasvati Vilasa and came to the conclusion that the right to a share comes into existence at birth, and subsists all through, although it is incapable of enforcement at the time of partition, because of the disqualification then existing. This decision is in keeping with the judgment in *Krishna* v. *Sami*,[1] which was referred to.

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1. (1885) I.L.R. 9 Mad. 64 (F.B.).
2. (1918) 38 M.L.J. 291: I.L.R. 43 Mad. 464.

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The decision of this Court in *Pudiava Nadar* v. *Pavanasa Nadar*[1] conflicts with *Krishna* v. *Sami*[2] and *Muthusami Gurukkal* v. *Meenammal*,[3] particularly with the latter. In *Pudiava Nadar* v. *Pavanasa Nadar*,[1] this question was referred to a Full Bench:

"Is a Hindu who is congenitally blind thereby excluded from the inheritance or has the rule become obsolete?"

One Kanakku Nadan had four sons, the plaintiff, the 9th defendant, Subbiah Nadan and Ulagamuthu Nadan. The plaintiff separated from his father, who lived with his other three sons, one of whom (the 9th defendant) was afflicted with congenital blindness. Kanakku Nadan, who had died before the date of the suit, had conveyed his property to his son-in-law, who in turn conveyed it to the 2nd and 3rd defendants. The plaintiff challenged the validity of these transactions. When he filed the suit the only brother alive was the 9th defendant. The defendants contended that the fact that the 9th defendant was alive was a bar to the suit. The plaintiff was by reason of the separation outside the family and if *Muthusami Gurukkal* v. *Meenammal*[3] was rightly decided the family estate had devolved upon the disqualified member, as he was the sole surviving member of the joint family, the plaintiff having left it. The Court, which consisted of Schwabe, C.J., Oldfield and Coutts-Trotter, JJ., held that the plaintiff, notwithstanding that he had separated from the family, was entitled to maintain the suit, and apparently he was given a decree for possession of the property. The Court considered that the blind brother was excluded from the inheritance and that the rule of exclusion had not become obsolete.

Schwabe, C.J., regarded the text of Yajnavalkya quoted by Vijnaneswara in placitum 1 of section 10 of the Second Chapter of the Mitakshara as authority for the opinion that a person born blind is not a coparcener. He ventured to criticise the judgment of Turner, C.J., in *Krishna* v. *Sami*,[2] in that it placed reliance on the Sarasvati Vilasa. He considered that the word 'share' would be better translated as 'interest'. I do not know on what Schwabe, C. J., based his opinion, but it is to be observed that the translation used in *Krishna* v. *Sami*[2] by Turner, C.J., is an accepted translation and that he was sitting with Muttusami Ayyar, J., who possessed, I understand, a knowledge of Sanskrit. My learned brothers who are now sitting with me are in that fortunate position and they tell me that the word 'share' is a translation of the Sanskrit word *amsa* which means 'fraction', and therefore in this connection should be translated as 'share'. I am not prepared to accept *Pudiava Nadar* v. *Pavanasa Nadar*[1] in preference to *Krishna* v. *Sami*,[2] where the two decisions conflict, but even if I were so inclined I should not be able to follow *Pudiava Nadar* v. *Pavanasa Nadar*,[1] because the decision in *Krishna* v. *Sami*[2] is a decision of a larger Bench and therefore is an overriding authority.

1. (1922) 43 M.L.J. 596: I.L.R. 45 Mad. 949 (F.B.).
2. (1885) I.L.R. 9 Mad. 64 (F.B.).
3. (1918) 38 M.L.J. 291: I.L.R. 43 Mad. 464.

The only other decision of this Court which calls for mention is that given in *Venkateswara Pattar* v. *Mankayammal.*[1] It was decided by Varadachariar and Burn, JJ., and in delivering the judgment of the Bench, Varadachariar, J., said:

"Among members of the joint family, placitum 7 of the Mitakshara does not in terms draw a distinction between cases of congenital disqualification and cases of supervening disqualification. But, here again, the logical application of the theory of right by birth, may justify a differentiation between the two cases, because the congenitally disqualified man would not have acquired a right by birth at all. The mere fact that the right of maintenance is equally available in both cases does not compel the view that the legal status must be taken to be the same in both cases."

The facts in that case did not call for a decision of the first question raised in this appeal and I do not read the judgment as expressing a definite opinion on the question under discussion.

I regard *Krishna* v. *Sami,*[2] as being binding on the Court, but I go further and say that I respectfully agree with all that is said in the judgment delivered in that case. It is a fundamental rule of Hindu law that a son born to a member of a joint family has on birth the right to share in the family estate. The fact that a son is born with an affliction which disqualifies him from enjoying his share does not rob him of his birthright. The affliction merely prevents his enjoyment of the right while the affliction lasts. The fact that the ancient texts recognise that his son, should one be born to him, has the right to share in the family estate is in itself an indication that he is a member of the coparcenary. In *Commissioner of Income-tax, Punjab* v. *Dewan Krishna Kishore,*[3] the Privy Council expressly recognised that under Hindu law, where the estate is impartible and the holder is joint with his kinsmen, it is the undivided family and not the holder who is the owner of the estate. Only the senior member has the right of enjoyment of the properties forming the family estate, unless there be a custom giving the junior members a subsidiary right of maintenance out of them. I can see no difference in principle here and this provides an additional reason for reading the words "excluding them from participation" used in the quotation from Yajnavalkya in placitum 1 of section 10, Chapter II of the Mitakshara as meaning exclusion from enjoyment of the share while the affliction continues. The main reason is what is stated in the subsequent placita and in Sarasvati Vilasa.

I turn now to the question whether a congenital idiot can be lawfully married. Placita 9, 10 and 11 of Chapter X clearly contemplate the marriage of a disqualified person and the Sarasvati Vilasa which is an accepted authority in Madras emphasises this. The learned advocate for the respondent has said that in these days it is unthinkable that a congenital idiot should be allowed to marry, and has pointed to the observations of the learned editor of the 10th edition of Mayne embodied in pages 150 to 153 of that edition. There is to be found there the statement that the marriage of a lunatic, an idiot or an impotent person

1. (1934) 69 M.L.J. 410.
2. (1885) I.L.R. 9 Mad. 64 (F.B.).
3. (1941) 2 M.L.J. 972 (P.C.).

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is invalid under Hindu law and reliance is placed on the decision of the Privy Council in *Mouji Lal* v. *Chandrabati Kumari*.[1] On the basis of that decision the learned author regards the judgment of this Court in *Venkatacharyulu* v. *Rangacharyulu*,[2] as being erroneous. I shall refer to these cases in more detail in a moment, but before doing so I may point out that at page 106 of the 6th edition of the work, the last edited by Mr. Mayne himself there is this statement:

> "As the great and primary object of marriage is the procuring of male issue, physical capacity is an essential requisite, so long as mere selection of a bridegroom is concerned; but a marriage with a eunuch is not an absolute nullity as with us. Mental incapacity stands in the same position. While the matter rested in contract, no Court, I imagine, would treat a promise to marry a lunatic or an idiot as binding; but the marriage, if celebrated, would be valid."

In the light of the texts which I have quoted I regard this as the correct statement of the law. Although infant marriages are now prohibited by statute the Hindu law recognised the validity of infant marriages. When a minor is married it means that his father or guardian has arranged the marriage for him.

In *Mouji Lal* v. *Chandrabati Kumari*,[1] Sir Arthur Wilson, in delivering the judgment of the Board, observed that the objection to a marriage on the ground of mental incapacity must depend on a question of degree. The Judicial Committee was not, however, called upon to consider in that case the question whether there could be a lawful marriage of a congenital idiot. Their Lordships were considering whether an adult who had previously married, was so mentally afflicted that he was incapable of entering into a contract for a second marriage.

In *Venkatacharyulu* v. *Rangacharyulu*,[2] Muttusami Ayyar and Shephard, JJ., observed:

> "There can be no doubt that a Hindu marriage is a religious ceremony. According to all the texts it is a samskaram or sacrament, the only one prescribed for a woman and one of the principal religious rites prescribed for purification of the soul. It is binding for life because the marriage rite completed by saptapadi or the walking of seven steps before the consecrated fire creates a religious tie, and a religious tie, when once created, cannot be untied. It is not a mere contract in which a consenting mind is indispensable. The person married may be a minor or even of unsound mind, and yet, if the marriage rite is duly solemnized, there is a valid marriage."

In *Muthusami Gurukkal* v. *Meenammal*,[3] Seshagiri Aiyar, J., said:

> "The view is that, if any of the excluded persons is capable of marriage and of begetting children, their shares should be managed for their benefit, and they should be given maintenance. This seems to follow from Manu, Chapter IX, Sloka 203. The professors of the Science of Eugenics may rightly protest against this tacit assumption by the ancient sages that an insane person can marry; but so long as the state does not prohibit such marriages the law cannot be abrogated. The ancient lawgivers even provided for the begetting of children on the wife of the incapacitated person. They seem to have been as anxious for giving facilities for the procreation of children as some of the sanest publicists and the heads of states after the Great War are to recognise and encourage the rearing up

1. (1911) 21 M.L.J. 933: L.R. 38 I.A. 122: I.L.R. 38 Cal. 700 (P.C.).
2. (1890) 1 M.L.J. 85: I.L.R. 14 Mad. 316.
3. (1918) 38 M.L.J. 291: I.L.R. 43 Mad. 464.

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of offspring however begotten. However that may be, the view of the author of Sarasvati Vilasa is more in consonance with the view that the right exists, but is only obscured for the time being. Mr. Srinivasa Aiyangar suggested that the parenthetical clause about capacity for marriage, suggested by the author of the Sarasvati Vilasa, does not destroy the root doctrine that the right is enforceable only, if and when there is full mental capacity at the date of partition. But the author distinctly says that the share should be managed because of the possibility of marriage thereby indicating that it exists and is not lost altogether.''

I consider that the opinions expressed in *Venkatacharyulu* v. *Rangacharyulu*[1] and *Muthusami Gurukkal* v. *Meenammal*[2] and by Mr. Mayne in the sixth edition of his work are preferable to the opinion expressed by the learned author of the tenth edition. It is undoubtedly abhorrent to a modern mind that a congenital idiot should be allowed to marry, but the Court here can only have regard to the personal law, and the personal law of the Hindu undoubtedly does regard such a marriage as being possible.

In the present case Chellakrishna's father arranged his marriage and his wife gave birth to two sons. For the reasons given I hold that Chellakrishna was lawfully married and as he had issues he has shown that he was capable of transmitting heritable blood, which means that the case comes completely within *Krishna* v. *Sami*.[3] In these circumstances his father had no right to bequeath the family estate to his widow and as the plaintiff's case rests entirely on the will her suit fails. My learned brothers agree with this conclusion and consequently the suit will be dismissed with costs throughout.

Krishnaswami Ayyangar, J.

Krishnaswami Ayyangar, J.—I agree.

Somayya, J.

Somayya, J.—In view of the importance of the question arising in this case, I wish to add a few words.

The question for decision is whether a disqualified person is a coparcener and has a title to his legitimate share of the family property notwithstanding the disqualification, being only excluded from enjoyment during the period of disqualification.

On this difficult question we derive no help from Mitakshara the well-known commentary of Vijnaneswara on the text of Yajnavalkya. The point is clarified in Sarasvati Vilasa, a work of very high authority in Southern India. The author elucidates the position in placita 148 and 149:

148. Manu also describes those who are ineligible for heritage:

''Impotent persons and outcasts do not take shares; so also those who are blind, and those who are born deaf, madmen, idiots, and the dumb, and those who are memberless.''

The commentator's remarks on this text are set out in **placitum 149.** He takes each word in Manu's text and gives his own commentary. First he takes impotent person and outcasts, the corresponding Sanskrit expression being क्लीबपतितौ a compound noun in which both the impotent persons and the outcasts are mentioned together. As regards these persons

1. (1890) 1 M.L.J. 85: I.L.R. 14 Mad. 316.
2. (1918) 38 M.L.J. 291: I.L.R. 43 Mad. 464.
3. (1885) I.L.R. 9 Mad. 64 (F.B.).

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(impotents and outcasts) the commentator states that they do not take shares. The Sanskrit expression is अनंशौ. *Amsa* means a share derived from the Sanskrit root अश् = to divide. The commentator says that these two classes of persons are पोष्यौ "to be maintained by their brothers who are eligible for the heritage, or by those who take the estate, or by those who take the woman."

Then he takes the born blind and the born deaf. In the corresponding Sanskrit text these two are mentioned in a compound noun जात्यन्धबधिरौ. The commentator says what their status is. This is important and the original of the commentary runs thus:

जात्यन्धबधिराविति द्विरुक्त्या तयोरंश:
अस्त्येवचा किं त्वं शयुत्कावावपि पोश्या विवाह सद्भावानो (?)

Foulkes translates this passage thus:

"Those who are born blind and those who are born deaf", the pair thus mentioned, though a share *certainly* belongs to them, are to be nourished and cherished, notwithstanding their being endowed with a share, because they are marriageable.

He further explains the meaning:

By the use of the word 'so' the inner meaning is, that deformed persons, if they are eligible for marriage, are sharetakers, and are to be nourished and cherished.

The word 'sharetaker' is here obviously used in contrast with 'share enjoyer', *i.e.*, they are not share enjoyers because they are excluded from participation. But as the commentator says, a share undoubtedly does exist. अंशोऽस्त्येव. The word एव is a very significant one.

Then he takes madmen, idiots and the dumb, these three being comprised in one compound noun in Sanskrit उन्मत्तजडमूकाश्च. This is translated by Foulkes thus:

"Madmen, idiots, and the dumb, by being mentioned in a group, these also are to be nourished and cherished, but they are not sharetakers. 'Even if they are eligible for marriage' is to be supplied, etc., etc."

"Even if they are eligible for marriage" as given in Foulkes' translation is not a correct one. The original Sanskrit expression is विवहार्हानचेत् and means " 'If they are not eligible for marriage' is to be supplied." The letter 'न' denoting 'not' is omitted in the translation. So the meaning is: If these people, madmen, idiots and the dumb, are not eligible for marriage, then they are not sharetakers implying that if they are eligible for marriage, they are certainly sharetakers. We are not concerned with the rest of this chapter.

The expression *"astyeva"* means they do take shares. The word "एव" is a very significant expression. Apte in his Sanskrit English Dictionary, page 316, explains the word "एव" *'Eva'* thus:

"This particle is most frequently used to strengthen and emphasize the idea expressed by a word 'just—quite—exactly'."

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According to this author, therefore, if the persons who are disqualified are capable of contracting a marriage, they are undoubtedly sharers.

I agree generally with the judgment just delivered by my Lord, the Chief Justice.

B. V. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AYYAR.

Subramania Pattar
v.
Porathana Andi.

P. R. Subramania Pattar .. *Petitioner* (Plaintiff)*

v.

Porathana Andi .. *Respondent (1st Defendant).*

Negotiable Instruments Act (XXVI of 1881), section 87—Promissory note—Introduction of words subsequent to execution which might widen liability of executant—Whether a material alteration.

Where in the suit promissory note subsequent to its execution the words 'the proprietor of the Karthika Stores' were introduced above the signature of the executant and below the date,

Held, that the alteration was a material one rendering the instrument unenforceable though it might be that the plaintiff had ultimately made up his mind to sue the defendant in his individual capacity and had accepted the defendant's case that he had nothing to do with the said stores at any time either as proprietor or in any other capacity.

Krushnacharana Padhi v. *Gourochandro Dyano Sumanto,* (1939) 2 M.L.J. 686, followed.

Davidson v. *Cooper,* (1844) 13 M. & W. 343: 153 E.R. 142, relied on.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of South Malabar at Calicut, dated 29th March, 1941 and passed in S.C.S. No. 189 of 1940.

C. S. Swaminathan for Petitioner.

S. Ranganatha Aiyar and *R. S. Swaminathan* for Respondent.

The Court delivered the following

JUDGMENT.—The Subordinate Judge held that the suit promissory note, Ex. A, was materially altered after it was executed and that certain words were introduced later. The words appear above the signature of the defendant and below the date and their translation is "the Proprietor of the Karthika Stores." The plaintiff is the assignee from the 2nd defendant who was the original payee.

As the alteration is apparent on the face of the document the onus is on the plaintiff to explain it and to show that it is not a material alteration which renders the instrument void and unenforceable. The plaintiff has made no such attempt. The learned Subordinate Judge has held that the alteration is material in that the defendant Andi was sought to be converted into "Andi, Proprietor of the Karthika Stores." The answer given by the plaintiff is that it does not amount to anything more than a mere description and that in this case it happens to be a wrong description because Andi was not the Proprietor of the Karthika Stores, either according to the plaintiff or according to himself.

*C.R.P. No. 2061 of 1941. 9th April, 1942.

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Therefore, he contends that it is an immaterial alteration which does not affect the legality of the note. Mr. Swaminatha Aiyar also contended that a mere description of that kind which is not found in the body of the document cannot absolve the personal liability of the executant under the note, as has now been held by a Full Bench of our Court.

The fact that an alteration does not ultimately involve any change in the rights and liabilities of the parties is not very germane to the consideration of the question whether it amounts to a material alteration within the meaning of section 87 of the Negotiable Instruments Act. Whether the change be prejudicial or beneficial to the maker does not in the least matter. To use the language of Lord Justice Brett in *Suffell* v. *The Bank of England*[1]

"Any alteration of any instrument seems to be material which would alter the business effect of the instrument if used for any ordinary business purpose."

One cannot definitely predicate what was at the back of the person who made the alteration and why it was considered necessary to have the words inserted in this note. It is not the plaintiff's case that it was some inexplicable or frolicsome act of a stranger. It may be, whatever the law was or is, that the plaintiff or the payee thought that the insertion of these words would widen the liability of the executant. It is also possible that the Karthika Stores were intended to be affected by this change. So long as it is not the same instrument as the defendant executed and there has been an alteration which might well be considered material even though ultimately it may not have the consequence that was intended, it is open to the defendant to say that the instrument that he gave has ceased to be of any force by reason of the alteration. To quote from the decision in *Krushnacharana Padhi* v. *Gourochandro Dyano Sumanto*[2] of Abdur Rahman, J.,

"If the legal identity or the character of the instrument has been affected or if the liability has been attempted to have been extended by the alteration, it must be held to be material and this would be so irrespective of the fact whether the alteration is to the prejudice of the promisor or the executant of the instrument or not."

Mr. Ranganatha Aiyar for the respondent relied on *Davidson* v. *Cooper*,[3] for the position that even an immaterial alteration would affect the binding nature of the instrument and he said that in that case the addition of two seals by and near to the respective signatures of the defendants was held sufficient to discharge the liability of the maker under the instrument. In urging this argument the learned advocate overlooked the fact that the addition of the seals was not an empty formality but was apparently intended to convert the document of guarantee into what is technically called the deed of the defendants. A deed technically so called imports certain liabilities and obligations of a wider nature than if it had remained an ordinary instrument of guarantee. This is apparent from the argument of Mr. Watson who

1. (1882) 9 Q.B.D. 555.
2. (1939) 2 M.L.J. 686.
3. (1844) 13 M. & W. 343; 153 E.R. 142.

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appeared for the defendant in that case who pointed out that the addition of the seals was most material if it was a deed, sealed and delivered. If the attesting witness was dead, upon the proof of his handwriting, it would have been taken to be a deed of the defendant and it would have been difficult for the defendant to negative the fact by evidence. If it was a document under hand only the consideration must have appeared on the face of it, but if it was under seal that objection would have been obviated. Again the period of limitation would be more or less according as the document were a deed or not. It was on such considerations that the Court of Exchequer held that the alteration was material and its decision was confirmed. Lord Denman, C.J., says:

"That the addition gives a different legal character to the writing and would, if made with the consent of all interested, completely change the nature of the relation towards each other of the parties to it, and the remedies upon it."

So it is not right to say that it was a case where a mere addition of seals had rendered the instrument void and of no effect, apart from the question whether the alteration by reason of this addition was material or not.

I agree, however, with the lower Court in thinking that the alteration in this case by the addition of the words "Proprietor of Karthika Stores" was a material alteration intended to be such though it might be that the plaintiff had ultimately made up his mind to sue the defendant in his individual capacity and has accepted the defendant's case that he had nothing to do with the Karthika Stores at any time either as proprietor or in any other capacity.

This revision petition is dismissed with costs.

K.C. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

A. L. N. Sathappa Chetti and others .. *Appellants** *(Plaintiffs)*

v.

Thayyanayaki Ammal .. *Respondent* *(Defendant).*

Sathappa Chetti v. Thayyanayaki Ammal.

Adverse possession—Delivery of symbolical possession during the period of adverse possession—Effect.

The plaintiff (a purchaser at a rent sale) though entitled to take actual possession of the property purchased after removing the defendant took only symbolical possession. The defendant had been all along living in a building on the site. In a suit for recovery of possession of the property,

Held, that the taking of symbolical possession interfered with the possession of the defendant and the latter could therefore start her adverse possession only from the date of the delivery of the symbolical possession to the plaintiff.

Kamayya v. *Mahalakshmi,* (1927) 53 M.L.J. 339, relied on.

Appeal against the decree of the District Court of Chingleput in A.S. No. 322 of 1938 presented against the decree of the Court of the District Munsiff of Poonamallee in O.S. No. 223 of 1937.

*S.A. No. 978 of 1940. 2nd July, 1942.

Sathappa Chetti v. Thayyanayaki Ammal.

N. G. Krishna Aiyangar for Appellants.

M. S. Venkatarama Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiffs 2 to 5 are the appellants. They are the legal representatives of the 1st plaintiff who died subsequent to the filing of the suit. The appeal is against the decree dismissing the plaintiffs' suit. The properties in dispute were purchased by the 1st plaintiff on 1st May, 1924, at a sale held for arrears of rent. The Revenue Court granted a sale certificate on 10th November, 1924. Subsequently there was an application for delivery of possession of the property and we find from a receipt granted to the party with the endorsement of the Revenue Inspector thereon that there was delivery of the property on 12th May, 1925. This suit was filed on 3rd May, 1937, for recovery of possession of the property. There was a building on the site and the defendant has all along been living in it. She pleaded that as she had been in possession for over twelve years the suit was barred by limitation that the delivery of possession on 12th May, 1925, was only a paper delivery in the sense that nothing more was done than the giving of a receipt by the auction-purchaser and it would not interfere with her possession and enjoyment. Both the lower Courts held that there was adverse possession for over 12 years and the suit was barred by limitation.

I do not think the view of the lower Courts is one that could be accepted. The auction-purchaser it is true could have obtained actual possession after removing the defendant, but he did not choose to do so. Instead he went to the locality with the Revenue Inspector and got the property delivered in the presence of witnesses there without physically evicting the tenant. It is urged for the respondent that there was absolutely no evidence to show that there was delivery of possession. The report of the Revenue Inspector is the report of an officer made in the discharge of his duty and it has to be presumed that what he stated there was true. The receipt specifically recites that the delivery was effected in pursuance of the Court's order and it is a certified copy granted by the Revenue Court. In a very nearly similar case in *Kamayya* v. *Mahalakshmi*,[1] where the plaintiff was entitled to take actual possession of the property but instead he got only symbolical possession it was held that the fact that he obtained only symbolical possession interfered with the possession of the defendant and that the defendant could start his adverse possession only from the date of the symbolical possession. This suit which has been filed within twelve years of the delivery receipt is hence in time.

The lower appellate Court's decree is set aside and the appeal is remanded to the lower Court for disposal of the other points arising in the appeal. Respondent will pay appellants their costs.

K.S. ——— *Appeal remanded.*

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1. (1927) 53 M.L.J. 339.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

F. P. S. Albuquerque .. *Appellant** *(Plaintiff)*

v.

The Catholic Bank, Ltd., Mangalore by its Secretary C. V. N. Pais and others .. *Respondents* *(Defendants).*

Albuquerque *v.* Catholic Bank, Ltd., Mangalore.

Company—Banking company—Provision in articles of association that office of director shall ipso facto *be vacated "if he becomes incapable of acting as a director"—Default of director in repaying loan to bank—If incapacitates him.*

One of the articles of association of a banking company declared that the office of a director shall be vacated "if he resigns or for any other reason becomes incapable of acting as a director". In the case of a director who had defaulted in repaying a loan to the bank,

Held, that, the exclusion of the new section 86-D (1) of the Indian Companies Act from banking companies under clause (3) of the same section makes it clear that loans to directors of a bank are contemplated as part of its business and it cannot be said that indebtedness to the bank would incapacitate a director. The article contemplates some incapacity such as illness, long absence, imprisonment, insanity or any other incapacity.

Appeal against the decree of the District Court of South Kanara in A.S. No. 192 of 1938 preferred against the decree of the Court of the Subordinate Judge of South Kanara in O.S. No. 36 of 1937.

R. Rajeswara Row and *John & Row* for Appellant.

B. Sitarama Rao and *S. J. S. Fernandez* for Respondents.

The Court delivered the following

JUDGMENT.—The only questions which arise in this second appeal are whether the resolution of the directors of the defendant bank removing the appellant from the board of directors was *ultra vires* and, if so, the damages to which he is entitled.

The respondents rely on article 78 (*g*) of the articles of association, which declares that the office of a director shall *ipso facto* be vacated:

"if he resigns, or for any other reason becomes incapable of acting as a director".

The ground on which the defendants relied to declare that the appellant had vacated his office was that he had defaulted in repaying a loan taken by him some years previously. The directors had earlier passed a rule that any director defaulting in repayment of a loan taken by him as principal borrower would cease to be a director. This rule, the respondents' learned advocate informs me, was passed under the powers conveyed by article 67 of the articles. This is clearly procedural only and gives no power to the directors to frame fresh articles of association. The removal of a director was already provided for in article 62 of the articles and this required an extraordinary resolution of the Bank. This rule was, therefore, *ultra vires* and cannot be relied on in support of the removal.

*S.A. No. 1173 of 1940. 29th June, 1942.

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Article 78 (*g*) of the articles contemplates resignation or some incapacity such as illness, long absence, imprisonment, insanity or any other incapacity. It cannot be said that indebtedness would incapacitate him and the learned advocate for the respondents has been unable to cite any authority to show that indebtedness to the bank is incapacity. The exclusion of the new section 86-D (1) from banking companies under Cl. (3) of the same section makes it clear that loans to directors of a bank are contemplated as part of its business. I agree with the lower Courts that the removal of the appellant was *ultra vires*. It follows that he is entitled to damages accordingly and on this point appellants' learned counsel says he will be satisfied with the nominal damages assessed by the lower Court, provided he be given costs.

In the result the suit is decreed for the damages already awarded by the trial Court with costs throughout. The Memorandum of cross-objections is ordered to be dismissed with costs.

Leave is refused.

K.S. *Memo. of Cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Chellappa Chettiar and others .. *Accused.**

Chellappa Chettiar, *In re.*

Criminal Procedure Code (V of 1898), *section* 528 (2)—*Case beyond jurisdiction of Sub-Magistrate—Power of District Magistrate to transfer—Exercise of—Procedure.*

The District Magistrate has as much power to transfer a case under section 528 (2) of the Code of Criminal Procedure as the High Court has under section 526. But neither the District Magistrate nor the High Court ought to transfer a case where the Subordinate Magistrate has no jurisdiction, the proper procedure in such a case being for the Sub-Magistrate to return the complaint stating that he may present the same to the Court having jurisdiction. The tribunal to decide whether the case is one within his jurisdiction and whether or not he should continue the trial is the Sub-Magistrate himself and not the District Magistrate or the High Court. It is always open to a Magistrate to try an accused for an offence less than that revealed in the complaint although it would ordinarily be improper for him to do so.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Ramnad in his letter, dated 12th May, 1942.

G. N. Chari for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The District Magistrate of Ramnad has come to the conclusion that a case tried by the Sub-Magistrate of Tiruvadadanai is beyond his jurisdiction, because there were allegations in the complaint indicating that an offence under section 148, Indian Penal Code, was committed, which offence is not triable by a Second Class Magistrate. The District Magistrate has therefore referred the matter to this Court in order that the case may

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*Crl.R.C. No. 314 of 1942 (Case Ref. No. 28 of 1942). 29th July, 1942.

be transferred from the file of that Sub-Magistrate to that of some Magistrate having jurisdiction.

Chellappa Chettiar, *In re.*

The District Magistrate has as much power to transfer under section 528 (2) of the Code of Criminal Procedure as this Court has under section 526, Criminal Procedure Code; but neither the District Magistrate nor this Court ought to transfer a case where the Magistrate has no jurisdiction, the proper procedure being for the Magistrate to return the complaint, telling the complainant that he may present the complaint to the Court having jurisdiction. The tribunal which is to decide at this stage whether or no the Sub-Magistrate should continue with the trial is neither the District Magistrate nor this Court, but the Sub-Magistrate himself. If he thinks he has jurisdiction, he must go on with the trial and dispose of the case. A Magistrate always has jurisdiction to try an accused for an offence less than that revealed in the complaint, although it would ordinarily be improper for him to do so. If a Magistrate at any stage of the trial is of opinion that an offence has been committed which cannot be tried by him, he should return the complaint as indicated above.

No interference is called for at this stage.

This reference is returned.

K.S. ——— *Reference returned.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

S. A. Abdul Subhan Sahib .. *Appellant** (*Defendant*)

v.

M. Abdul Ravoof Sahib .. *Respondent* (*Plaintiff*).

Abdul Subhan Sahib *v.* Abdul Ravoof Sahib.

Partnership Act (IX of 1932), section 69 (2)—Scope and applicability.

Section 69 (2) of the Partnership Act has no application to a suit for the enforcement of an agreement entered into after the dissolution or at the time of the dissolution between the partners of an unregistered firm under which some definite amount was payable by one partner to another because it does not relate to a suit on behalf of the partnership.

Patel v. *Husseinbhai Mahomed,* I.L.R. (1937) Bom. 628 and *Appaya Nijlingappa* v. *Subrao Babaji,* I.L.R. (1938) Bom. 102, distinguished.

Appeal against the decree of the District Court of Trichinopoly in A.S. No. 304 of 1940 preferred against the decree of the Court of the District Munsiff of Trichinopoly in O.S. No. 527 of 1938.

K. P. Ramakrishna Aiyar for Appellant.

B. Pocker for Respondent.

The Court delivered the following

JUDGMENT.—The only point for consideration in this second appeal is whether the contract sought to be enforced in the suit is one to which the provisions of section 69 of the Partnership Act apply and the suit is hence not maintainable. Both the lower Courts have held that, though the partnership had not been registered, the contract did not come within the purview of section 69 of the Partnership Act and that the suit is maintainable.

*S.A. No. 024 of 1941. 29th June, 1942.

Abdul Subhan Sahib v. Abdul Ravoof Sahib.

The suit was for the recovery of money agreed to be paid by one partner to another under an agreement entered after the partnership was dissolved and accounts were looked into. It is an agreement entered into after the dissolution and in the course of the settlement of accounts as between the partners. It is true that the dissolution and the taking of accounts were contemporaneous but it cannot be said that the taking of accounts was not subsequent to the dissolution because there could have been no taking of accounts unless there was a dissolution.

The two decisions relied on for the appellant and referred to by the learned District Munsiff in his judgment, *viz., Patel* v. *Husseinbhai Mahomed*[1] and *Appaya Nijlingappa* v. *Subrao Babaji*[2] have no application to the facts of the present case. The first was a suit for recovery of money paid by one of the partners as income-tax payable by the firm subsequent to the dissolution. The assessment itself was subsequent to the dissolution. The liability to pay that amount was not a liability arising under the contract entered into at the time of the dissolution but the enforcement of a right conferred under the Act. The second was a suit for the recovery of money due to a dissolved partnership filed by the original partners suing for and on behalf of the firm. But this is altogether a different case. This is a suit for the enforcement of an agreement entered into after the dissolution or at the time of the dissolution between the partners under which some definite amount was payable by one partner to another. Section 69 (2) has no application because it relates to a suit on behalf of a partnership and this is not such a suit. With regard to sub-section (1) it may be said that it applies to a suit by a partner and that the partner may be one of a dissolved partnership. There are observations in *Patel* v. *Husseinbhai Mahomed*[1] to indicate that the suit contemplated by section 69 may be a suit by a partner of a dissolved firm. But then, as pointed out already, that was a case not of a partner enforcing a contract entered into after dissolution as between the partners but a suit by a partner of a dissolved firm claiming rights conferred upon him under the Act or enforceable by him under the terms of the partnership contract.

The section has to be strictly construed and I do not think on reading the section as it stands I will be justified in holding that the bar extends to suits for recovery of money due on a contract entered into between the partners of an unregistered firm in pursuance of an agreement entered into after dissolution and the taking of accounts. As a matter of fact section 69 (3) (*a*) states that sub-sections (1) and (2) shall not affect the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm. This is a case in which the firm was dissolved, the accounts were taken and in pursuance of the taking of the accounts certain amounts found due to the respondent plaintiff were agreed to be paid by the appellant defendant. I do not think it

1. I.L.R. (1937) Bom. 628.
2. I.L.R. (1938) Bom. 102.

can be said that it was contemplated by the legislature that the prohibition under section 69 should apply to enforcement of contracts of this kind.

Abdul Subhan Sahib *v.* Abdul Ravoof Sahib.

In the result the appeal fails and is dismissed with costs.

Leave refused.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

C. Velayudha Mudali .. *Appellant** *(Petitioner)*

v.

T. Chengama Naidu and another .. *Respondents* *(Respts. 2 and 5).*

Velayudha Mudali *v.* Chengama Naidu.

Madras Agriculturists' Relief Act (IV of 1938), sections 19 and 20—Proceedings under O. 21, r. 90 of the Code of Civil Procedure in respect of a sale held before 1st October, 1937—Necessity to be stayed as "proceedings in execution" pending an application under section 19 of Act IV of 1938.

Proceedings under O. 21, r. 90 of the Code of Civil Procedure are proceedings in execution which must necessarily be stayed when an order under section 20 of Madras Act IV of 1938 has been passed, until the disposal of a pending application under section 19. The fact that a sale held before 1st October, 1937, cannot be set aside under Madras Act IV of 1938 does not justify the Court in going on with proceedings relating to such a sale when all execution proceedings have been stayed.

Appeal against the order of the District Court of Chingleput, dated 20th December, 1940 and made in M.P. No. 453 of 1937 in E.P. No. 16 of 1933 in O.S. No. 6 of 1929.

R. Gopalaswami Aiyangar for Appellant.

K. V. Ramachandra Aiyar, P. V. Raghavan, K. M. Venkatavaradachariar and *S. Krishnaswami* for Respondents.

The Court delivered the following

JUDGMENT.—It seems to us clear that proceedings under O. 21, r. 90 of the Code of Civil Procedure are proceedings in execution which must necessarily be stayed when an order under section 20 of Madras Act IV of 1938 has been passed, until the disposal of a pending application under section 19. The fact that a sale held before 1st October, 1937, cannot be set aside under Madras Act IV of 1938 does not justify the Court in going on with proceedings relating to such a sale, when all execution proceedings have been stayed. In such circumstances the order passed under O. 21, r. 90 is an illegal order and it must be set aside. The lower Court will be directed to dispose of the application under section 19 at once and thereafter to hold a fresh enquiry into the petition under O. 21, r. 90. The appellant is entitled to costs in this appeal, payable by the decree-holder.

K.S. ——— *Appeal allowed.*

*A.A.O. No. 10 of 1941. 13th July, 1942.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE HAPPELL.

Ramudu, *In re.*

Chevveti Ramudu and another .. *Prisoners* * (*Accused*).

Criminal Trial—Offence of murder—Accused of or above sixteen years of age—If ground for commuting sentence of death.

Section 22 of the Madras Children Act provides that no 'child' or 'young person' (that is a person under fourteen or one who is fourteen but under sixteen years of age) shall be sentenced to death. There is no provision of law that sentence of death shall not be passed on a person of or above sixteen but not more than eighteen years of age. A sentence of death cannot be commuted in the absence of mitigating circumstances purely on the ground of the young age of the accused. To do so will be to extend the Children Act beyond the age contemplated by the Legislature. The prerogative of mercy in individual cases lies with the Provincial Government and it is for the Legislature to amend the Children Act, if an amendment seems required and to fix the age below which the sentence of death shall not be passed at a higher level.

Trial referred by the Court of Session of the Vizagapatam division for confirmation of the sentences of death passed upon the said prisoners in C.C. No. 10 of 1942 on 28th March, 1942, and appeal by the said prisoners against the said sentences of death passed upon them in the said case.

S. Suryaprakasam for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following Judgments:—

Mockett, J.

Mockett, J.—I entirely agree with the conclusion at which my learned brother has arrived with regard to the correctness of the conviction and the sentence in this case and I do not intend to add anything to what he has said with regard to the conviction. I, however, desire to express my explicit agreement with the observations that he has made on the subject of the sentence in this case. There is no doubt whatever that the authorities on the subject are abundant that the normal sentence for conviction for murder is that of death. Section 367 of the Criminal Procedure Code makes it clear in sub-Cl. (5) that if the accused is convicted of an offence punishable with death and the Court sentences him to a punishment other than death, the Court shall in its judgment state the reasons why the sentence of death was not passed. What reason could the learned trial Judge give in this case? The facts were that two young men committed a cold-blooded and atrocious murder of a young child for the purpose of gain. No reasons arising out of the facts could be given. The only conceivable reason that could be given was that the criminals were young men. But my learned brother has pointed out to-day and recently in R.T. No. 82 of 1942, that it is not the law that a young man, *e.g.*, between 16 and 18 should not in any circumstances be sentenced to death. This High Court has frequently said that youth is not a reason why the Court should not do its duty. For us to accede to the plea of the learned counsel for the accused in this case would in my view amount to this, we should be indicating that a learned Sessions Judge had acted wrongly when in fact he

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*R.T. No. 88 of 1942 (Crl. A. No. 254 of 1942). 14th July, 1942.

had acted absolutely rightly and by inference would be suggesting that he had erred in doing his duty when in fact we should not be doing ours. This Court, it must be remembered, is concerned with the passing of sentence and not with its execution and when it has passed or confirmed a sentence its duty is done.

Happell, J.—The appellants have been convicted by the Sessions Judge of Vizagapatam for the murder of a boy of eight years of age named Arjunamurti on the 17th of October last.

The accused are themselves youths of not much over sixteen. The 2nd accused was a farm servant in the employment of the father of the deceased boy. The boy was last seen by his father when he went out on the morning of the 17th to the fields to untie the cattle. At about midday that day, according to the evidence of the father as P.W. 2, the 2nd accused told him that the deceased had not been to the field to untie the cattle. From that time a search was made for the boy, but he was not found until two days later, on the 19th, when the witness, P.W. 5, saw the corpse of a boy floating in a well in his field and reported the fact to P.W. 2. The boy was recognised by P.W. 2 as his son and he noticed that the ear-rings and the nose-ring that the boy had been accustomed to wear were missing. He made a report to the Village Munsiff and in the report mentioned that the boy had been wearing jewels and that they had been torn off. The medical evidence leaves no room for doubt that the boy had been murdered. Six ribs on the left side of the chest had been fractured and the lower lobes of both the ears had been torn.

Except for the evidence of one witness, P.W. 6, who says that he noticed the two accused following the boy Arjunamurti when he, the witness, saw him on the morning of the 17th on his way to his cattle shed and spoke to him, there is nothing which connects the two accused with the murder of the boy except their alleged possession, the 1st accused of a red cloth and the 2nd accused of two ear-rings and a nose-ring which belonged to the boy and the statements which, according to the prosecution, led to the recovery of these articles. The evidence is that the 2nd accused was first arrested on the 21st of October. When arrested, he made a statement in which he said that he and the 1st accused had dragged the boy into a shed and that there, while the 2nd accused held his legs, the 1st accused trampled on his neck and chest and killed him. After the boy had been killed the 1st accused forcibly removed the two gold ear-rings and the nose-ring and kept them with him, while both of them took away the red cloth which Arjunamurti was wearing and hid it under a heap of manure. The 2nd accused took the police and the witnesses to this heap of manure and produced the cloth M.O. 1. The 1st accused was then arrested and he, after stating that he had forcibly removed the gold ear-rings and the nose-ring from Arjunamurti and had hidden them under a stone by the side of the house of a certain Pampanaboyina, took the police and witnesses to this place and produced the jewels. Both in the Committing Magistrate's Court and in the Sessions Court the two accused denied all knowledge of the offence and asserted that they had made no confessions at all to the police. In face of the production of the cloth

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Happell, J.

and the jewels these denials cannot be believed. There is no doubt that the jewels [M.Os. 2, 2 (*a*) and 3] and the red cloth (M.O. 1) were the jewels and cloth worn by the child, when last seen since there was no cross-examination of the witnesses who spoke to the identification of the jewels and the ownership of them by the deceased boy. The learned Sessions Judge was therefore unquestionably right in accepting the evidence that the cloth and jewels were recovered in consequence of the statements made by the accused. Even, however, if the statements themselves are ignored, the evidence that the two accused were seen following the deceased that morning taken with the facts that a few days later a cloth belonging to the boy was found in the possession of the 1st accused and jewels which the boy had been wearing were found in the possession of the 2nd accused, in default of any reasonable explanation, would lead inevitably to the conclusion that the accused are guilty of the murder of the boy. There can be no doubt therefore that the conviction of both the accused for murder was correct.

The learned Sessions Judge sentenced both the accused to death. It has been pressed on us that in view of their ages we should take a merciful view and commute the sentence of death to a sentence of transportation for life. It will be as well here to refer to the evidence relating to the ages of the accused. The 1st accused appears himself to have given his age as 18 in the Magistrate's Court and as 17 in the Sessions Court, while the 2nd accused has given his age as 17 in the Magistrate's Court and 17 again in the Sessions Court. The learned Sessions Judge was apparently not satisfied that the ages of the accused had been correctly given and he quite rightly had medical evidence on the subject taken. A witness examined as P.W. 1, the Radiologist attached to King George Hospital at Vizagapatam, gave it as his opinion that both accused 1 and 2 were between 16 and 17 years of age and that he was positive that they were above 16 years of age. He said he was positive that they were above 16 years of age because the fusion of the upper end of the ulna bone had taken place in the case of both the accused, a fusion which takes place on the completion of 16 years. In cross-examination he stated that in the case of both the accused bones which ought to fuse at 18 were beginning to fuse already, showing clearly that they were above 16 years of age. The general effect of his evidence as a whole therefore seems to be that the two accused were both of them certainly over 16 years of age and that they might have been as much as 18. Section 22 of the Madras Children Act provides that no child or young person shall be sentenced to death. A "child" for the purpose of the Act is a person under the age of 14 years and a "young person" is a person who is 14 years of age and under the age of 16 years. There is no provision of law that sentence of death shall not be passed on a person of or above 16 but not more than 18 years of age. I had occasion a few days ago to say in a similar case—R.T. No. 82 of 1942—that to commute a sentence of death in the absence of any mitigating circumstances purely on the ground of the age of the accused was in effect to lay it down that

persons of a certain age should never be sentenced to death, even though that was not the law. In the present case, there are no mitigating circumstances at all, and to commute the sentence of death because the accused are only 16 or 17 years of age would in fact be to extend the Children Act beyond the age which was contemplated by the Legislature. The prerogative of mercy in individual cases lies with the Provincial Government; and, it is for the Legislature to amend the Children Act, if an amendment seems required, and to fix the age below which sentence of death shall not be passed at a higher level. It is not for us to usurp the functions of the Legislature. The convictions of both the accused are therefore confirmed and the sentences of death passed on them. The appeal is dismissed.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

Akkammal .. *Appellant** *(1st Deft.)*

v.

Komarasami Chettiar and others .. *Respondents* *(Plff. & Defts. 2 to 6).*

Res Judicata—*Civil Procedure Code (V of 1908), O. 21, rr. 63 and 100 —Order on claim petition not set aside—Later partition suit—Different decision on title—Parties to claim petition also parties in the suit—Decision in suit not* res judicata *as regards title—Claim order conclusive.*

On 2nd July, 1925, *K* sold to his brother *V* a house. Later on with a view to prevent the property falling into the hands of his creditors, *V* executed a deed of release of his ownership in favour of *K*. *V* was subsequently adjudicated insolvent and in July, 1930, the Insolvency Court set aside the deed as a sham transaction on an application by the Official Receiver. In October, 1930, the Official Receiver sold the house to *S* who in his turn in November sold it to the present respondent. The latter obtained possession from the Receiver in March, 1931. The appellant a mortgagee from *K* of another property brought a suit on his mortgage in 1929 and obtained an attachment before judgment of the suit house on the ground that the mortgaged property would be insufficient to meet his claim. In February, 1930, a mortgage decree was passed and the mortgaged property was sold. As it did not realise sufficient to discharge the decree amount, the appellant sought to have the suit house sold. A claim petition filed by the present respondent was dismissed in August, 1931. The sale of the house was held and the appellant purchased it himself. When he was being given possession, the present respondent filed an application under O. 21, r. 100, Civil Procedure Code, which was dismissed in August, 1935, and the present suit was filed in July, 1936. Meanwhile in July, 1931, *K's* sons had filed a partition action against *K*, seeking *inter alia* to set aside the alienation of the suit house by *K* in favour of *V* and the mortgage of the other property in favour of the appellant. Both the present appellant and the present respondent were made parties to the suit. The lower Court upheld the alienations. On the question, as to the effect in these circumstances of the claim order and the later decision in the partition suit on the title to the suit house,

Held, that the provisions of O. 21, r. 63, Civil Procedure Code, being mandatory, the order on the claim petition against the respondent had become final, not having been set aside by a suit brought within the prescribed time. He could not therefore take advantage of the later decision in the partition action and contend that it would operate as *res judicata* on the question of title.

*L.P.A. No. 24 of 1941. 25th March, 1942.

Akkammal *v.* Komarasami Chettiar.

Krishna Rau v. *Lakshmana Shanbhogue*, (1881) I.L.R. 4 Mad. 302, referred to.

Appeal under Cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Patanjali Sastri, dated the 13th February, 1941, and passed in S.A. No. 22 of 1938, preferred against the decree of the Court of the Subordinate Judge of Dindigul in A.S. No. 18 of 1937 (O.S. No. 148 of 1936, District Munsiff's Court, Dindigul).

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Appellant.

K. Raja Aiyar for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The decision in this appeal turns on the answer to be given to a question of law, but in order to understand the question it is necessary to set out the facts, which are of a complicated nature.

On the 2nd July, 1925, one Krishna Aiyar sold to his brother Venkatachalapathi Aiyar a house in Dindigul town. Some eight months later Venkatachalapathi Aiyar executed a deed purporting to release his ownership of the property in favour of his brother Krishna Aiyar. The reason for this transaction is apparent. Venkatachalapathi Aiyar was in financial difficulties and he wanted to prevent the property falling into the hands of his creditors. In the course of the year he was adjudicated an insolvent and it is not a matter for surprise that the Official Receiver thought fit to take steps to obtain an order of the Court setting aside the deed under which Venkatachalapathi Aiyar purported to revest the title in his brother. On the 10th July, 1930, the Insolvency Court held that this was a sham transaction and cancelled the deed. This meant that the title to the property vested in the Official Receiver, as representing the estate of Venkatachalapathi Aiyar. On the 30th October, 1930, the Official Receiver sold the property to one Sulaiman, who on the 8th November, 1930, sold it to the respondent in this appeal. On the 29th March, 1931, the Official Receiver delivered possession to the respondent.

On the 20th July, 1925, Krishna Aiyar mortgaged to the appellant other immovable property. The mortgage debt was not re-paid and the appellant was compelled to file O.S. No. 77 of 1929, in the Court of the District Munsiff, Dindigul, to enforce his mortgage. As the property mortgaged was not of sufficient value to meet the appellant's claim, he applied for, and obtained, an order for attachment before judgment of the house conveyed by Krishna Aiyar to Venkatachalapathi Aiyar and now in suit. On the 11th February, 1930, the appellant was granted a mortgage decree and the property covered by it was sold in execution. As it did not realize sufficient to discharge the decretal amount, the appellant filed an application asking for the sale of the house which he had attached before judgment. The respondent then filed a petition claiming that the property was his, but this petition was dismissed on the 20th August, 1931. Thereupon the appellant proceeded with his application in execution and the house was in due course sold by the Court, the appellant being the purchaser. When he was given possession, the respondent

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filed an application under r. 100 of O. 21 of the Code of Civil Procedure asking the Court to restore possession to him. This application was dismissed on the 20th August, 1935, and consequently on the 12th July, 1936, the respondent filed in the Court of the District Munsiff of Dindigul the suit which has given rise to this appeal.

It is now necessary to return to the events of 1931. On the 23rd July of that year Krishna Aiyar's sons, who are respondents 3 to 6 in this appeal, brought a suit against their father for partition of the family estate. They challenged the validity of a number of alienations made by him, and the number included the sale to his brother Venkatachalapathi Aiyar of the house and the mortgage of other property created in favour of the appellant on the 20th July, 1925. The appellant and the respondent were both made parties and their interests clashed. The respondent claimed title to the house in Dindigul through Venkatachalapathi Aiyar and the appellant claimed title to it through Krishna Aiyar. The Subordinate Judge of Dindigul, in whose Court the partition suit was instituted, held that the sale of the house in Dindigul by Krishna Aiyar to Venkatachalapathi was valid and he also held that the mortgage of the other property in the appellant's favour was valid. The judgment in the partition suit was given on the 8th September, 1933, and as it was held that the sale to Venkatachalapathi Aiyar was lawful, the appellant had no right to attach the property in execution of his decree against Krishna Aiyar.

In the present suit the District Munsiff held that the decision in O.S. No. 49 of 1931 did not call into operation the doctrine of *res judicata* and consequently the order on the claim petition was conclusive. The respondent appealed to the Subordinate Judge, who reversed the decree of the District Munsiff. The Subordinate Judge was of opinion that the doctrine of *res judicata* did operate and that the decree in O.S. No. 49 of 1931 being of a later date than the order of the 20th August, 1931, dismissing the respondent's claim, the decree in O.S. No. 49 of 1931 should prevail. The respondent appealed to this Court and Patanjali Sastri, J., who heard the appeal agreed with the Subordinate Judge. This appeal is from the judgment of Patanjali Sastri, J.

If O.S. No. 49 of 1931 stood alone, there could be no doubt that the decision would operate as *res judicata* on the question of title. The question of title was directly in issue between the appellant and the respondent, the appellant claiming through Krishna Aiyar and the respondent through his brother, Venkatachalapathi Aiyar. The decision of the appeal depends, however, on whether Patanjali Sastri, J., was right in applying here the principle that where there are conflicting judgments *inter partes* the later adjudication should be taken as superseding the earlier, a principle which was applied by this Court in *Moturi Seshayya* v. *Sri Rajah Venkatadri Appa Rao*[1] and *Appia Rukmani Ammal* v. *Kuttuvava Narasimha Aiyar*.[2] The learned Judge relied on the

1. (1916) 31 M.L.J. 219.
2. (1921) 41 M.L.J. 54.

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Leach, C.J.

judgments in those cases, but the facts were very different and there was there no question of the application of O. 21, r. 63.

Order 21, r. 63 states that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of his suit, should he file one, the order is conclusive. This is a statutory provision and consequently the Court must apply it. In *Krishna Rau* v. *Lakshmana Shanbhogue*,[1] Turner, C.J. and Kindersley, J., had to consider the corresponding provision in the Code of 1859. A person holding a decree for money against a member of an undivided Hindu family attached the judgment-debtor's interest in certain lands alleged to be the joint property of his family. The appellant objected to the attachment on the ground that the property was not family property or partible. His objection was overruled, but he did not bring a suit within one year from the date of the order. The decree-holder, who purchased the judgment-debtor's right in the lands attached and sold, brought a suit within one year from the date of the order to obtain what he had bought at the Court sale. It was held that the appellant was estopped from again pleading that the same property was not family property or partible. The appellant sought to treat the decree-holder's suit as having the same effect as if he himself had brought the suit within one year from the date of the dismissal of his claim petition. It was urged on his behalf that at the time the suit was brought, it was still open to him to bring a suit to establish his right and that he might avail himself of any right which he could enforce by action. It was held that he could not. The learned Judges observe that the order was and was intended to be a summary declaration of a want of title in the objector, which declaration would amount to a final decision of the question between the parties, if the party aggrieved did not take the course indicated by the institution of a suit to supersede it.

This decision was followed in *Peela Yarakayya* v. *Venkata Krishnamraju*,[2] which concerned the present Code. The defendant failed to file a regular suit to set aside an order disallowing his claim to property which had been attached within one year from the date of the dismissal order, but the defendant subsequently trespassed upon the property and dispossessed the plaintiff, who thereupon brought a suit within one year of the order for recovery of possession. The defendant pleaded that the property was his own, but this plea was rejected on the ground that the order on the claim petition and the question of title had become conclusive because no independent suit was brought by the unsuccessful claimant within one year, as contemplated by r. 63. There is another Bench decision of this Court to the same effect. See *Kumaran Uni Achan* v. *Kunhikrishnan Nair*.[3]

In view of the mandatory provision of r. 63 there is no room for the application of the principle on which Patanjali Sastri, J.,

1. (1881) I.L.R. 4 Mad. 302.
2. (1917) 6 L.W. 281.
3. (1923) 19 L.W. 394.

based his decision. R. 63 says that the order passed on the claim petition shall be conclusive unless the petitioner files a suit within one year to establish the right which he claims. The fact that the decree-holder may file another suit within twelve months to establish a right which he claims does not relieve the objector from the necessity of complying with r. 63. The wording of the section itself is clear on this question, but we have in addition the three decisions of this Court to which reference has just been made. The respondent was not entitled to rely on the partition suit filed by Krishna Aiyar's sons and therefore he was not entitled to a decree in the suit which he filed when the adverse order was passed against him on the application under r. 100.

Akkammal v. Komarasami Chettiar.

Leach, C.J.

The appeal will be allowed with costs throughout.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Annabattula Appalaswami .. *Petitioner** *(Petitioner)*

v.

Mandala Appamma and others .. *Respondents* *(Counter-Petitioners).*

Appalaswami v. Appamma.

Madras Agriculturists' Relief Act (IV of 1938), section 15—Decree for arrears of rent for faslis 1341 to 1343—Execution—Attachment of sum lying to tenant's credit in Munsiff's Court—Transfer of amount to credit of rent suit and deposit in Revenue Court—If tenant can apply to treat amount as payment towards rent for fasli 1347 so as to enable him to get benefit of section 15 (4).

Where there is in deposit after Madras Act IV of 1938 came into force an amount of money earmarked for the rent of a particular holding as decreed it would have to be drawn out by the landholder only in accordance with the provisions of section 15 (3) for credit firstly to the two faslis mentioned therein, and the landholder so withdrawing money would presumably be relieved of the necessity of recording satisfaction of the decree for earlier faslis to the extent to which the statutory re-appropriation is made, the question of the satisfaction of such decree being left to be worked out in accordance with the provisions of section 15 (4).

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Revenue Divisional Officer, Parvatipur, dated 10th November, 1938, and made in M.P. No. 17 of 1938 in E.P. No. 2 of 1938 in E.L.S. No. 118 of 1934.

S. Ramamurti for Petitioner.

V. Govindarajachari for Respondents.

The Court delivered the following

JUDGMENT.—This petition raises questions under section 15 of Act IV of 1938 resulting from rather unusual facts. The petitioner was the tenant and against him a decree had been passed for arrears of rent for faslis 1341 to 1343. At the same time he was litigating with his landlord in the Civil Court and as a result of that litigation there was an amount of Rs. 100 lying in deposit in the Court of the District Munsiff which the peti-

*C.R.P. No. 1161 of 1941. 10th July, 1942.

Appalaswami *v.* Appamma.

tioner was entitled to draw subject only to a possible claim for restitution by the landlord. The landlord executing his decree for rent got a prohibitory order attaching this sum of Rs. 100 lying in the District Munsiff's Court to the credit of the tenant. It is asserted in the petition under section 15 to the Revenue Court that this sum of Rs. 100 was actually transferred to the credit of the rent suit and was lying in deposit in the Revenue Court at the relevant period. This assertion is not contradicted in the counter-affidavit. On 27th September, 1938, the tenant made this application to the Revenue Court praying that the deposit of Rs. 100 lying in the Revenue Court to the credit of the rent suit should be treated as a payment towards the rent for fasli 1347 so as to enable the tenant to get the benefit of section 15 (4) of Act IV of 1938. Objection was taken on various grounds, one of which was that the rent due for fasli 1347 was Rs. 130 so that the deposit made would not suffice to qualify the applicant for relief. Without going into the figures the learned Deputy Collector held that section 15 (4) does not contemplate the use of amounts covered by execution proceedings in some other connection to entitle the tenant to get relief. The petition was therefore dismissed.

The matter is not free from difficulty, but it seems to me that the view taken by the learned Deputy Collector is open to criticism. Under section 15 (4) the tenant can claim relief not merely on the basis of a payment to the landholder but on the basis of a payment into Court, the Court being in this case the Court of the learned Deputy Collector. Under section 15 (3) the landholder is under an obligation to credit any payment of rent in the first instance towards the rent due for fasli 1347 and not towards the rent due for any previous fasli. Reading these provisions together, it would seem to follow that where there is in deposit an amount of money earmarked for the rent of a particular holding as decreed, the landholder should not be allowed to draw out that money except on the terms that he credits it in the manner laid down in the statute. The tenant may reasonably assume that the amount of money so deposited would be used in the way contemplated in section 15 (3). While therefore under the ordinary law, the tenant would have no power to require the Court to divert the attached sum away from the decree under which it has been attached, any more than he would have the power to require his landlord to divert an amount appropriated towards earlier faslis so as to satisfy the rent of a later fasli, the conclusion seems irresistible that the provisions of section 15 (3) and (4) override the ordinary law in this respect. That is to say, when there is rent deposited in Court after the Act came into force, it would necessarily have to be drawn by the landholder only in accordance with the provisions of section 15 (3) for credit firstly to the two faslis mentioned therein. Presumably the landholder withdrawing the money in pursuance of section 15 (3) of the Act would be relieved of the necessity of recording satisfaction towards the decree for earlier faslis to the extent to which the statutory re-appropriation is made, the question of the satisfaction of this decree being left to be worked out in accordance with the provisions of section 15 (4).

If this view is correct, it seems to me that the order of the learned Deputy Collector cannot be upheld. This sum of money, though earmarked for the old decree, could not legally be used by the decree-holder for the purpose for which it was earmarked until the arrears of faslis 1347 and 1346 had been satisfied. He would not, I think, be justified in opposing the adjustment of this deposit until the time stipulated in section 15 (1) of the Act had elapsed in order to defeat the provisions of that section. Assuming that the money was actually in deposit in the Revenue Court before 30th September, 1938, when this application was made by the tenant that effect be given to section 15 (3) and (4) and that this amount be credited firstly to fasli 1347, in my opinion the Court should have taken such action as was necessary to see that the obligation imposed by statute on the landholder was enforced. If, of course, the money was not in fact in deposit with the learned Deputy Collector until after 30th September had passed, the tenant would clearly have no right under section 15 (4) at all. If, moreover, the amount standing to the credit of the tenant in the Revenue Court together with any other payment made towards the rent of fasli 1347 on or before 30th September, 1938, was less than the amount due for that fasli, including any interest that might be due thereon, then clearly the tenant's right to scale down the rent would disappear.

The civil revision petition is therefore allowed and the application is remanded to the trial Court for fresh disposal in the light of this judgment after recording findings on the questions (1) whether the deposit of Rs. 100 was lying to the credit of the rent suit in the Revenue Court on or before the 30th September, 1938, and (2) whether this amount together with any other payments made by the tenant on or before 30th September, 1938, was sufficient to satisfy the claim for rent of fasli 1347 together with any claim for interest thereon. Costs in revision will abide by the result.

K. C. ——— *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

T. P. R. Palania Pillai (died) and others .. *Appellants** *(Defendants)*

v.

Amjath Ibrahim Rowther and another .. *Respondents* *(Plaintiffs)*.

Limitation Act (IX of 1908), article 144—Applicability—Usufructuary mortgage of some items of property by some members of a Muhammadan family—Mortgagee entering into possession of mortgaged items—Limitation and adverse possession against other co-owners—Commencement.

Where some co-owners usufructuarily mortgage specific items of property held by the members of a Muhammadan family and the mortgagee enters into possession of the mortgaged items under his mortgage-deed, a

*S.A. No. 753 of 1940. 6th July, 1942.

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suit by other members of the family to recover their share therein is barred by article 144 of the Limitation Act at the end of twelve years of such possession and adverse possession as against those members cannot be said to begin only from the date of ouster to their knowledge.

Appeal against the decree of the District Court of Tinnevelly in A.S. No. 169 of 1938, preferred against the decree of the Court of the Subordinate Judge of Tinnevelly in O.S. No. 36 of 1939.

K. S. Sankara Aiyar for Appellants.

S. Rangachariar for Respondents.

[This second appeal coming on for hearing, the Court (*King, J.*) made the following] :—

Order of Reference to the Full Bench
(*9th April*, 1942).

The appellant here is the 8th defendant who had taken a usufructuary mortgage of some property from the 1st and 3rd defendants. 1st and 3rd defendants were members of a Mohammadan family and as such co-sharers in the mortgaged property and not full owners of it. This question arose in a suit brought by the plaintiff, another co-sharer for a partition. The plaintiffs claim that the mortgage is not valid or binding upon them. The mortgage was in 1920 and it is claimed on behalf of the 8th defendant that a suit filed in 1937 against him is barred under article 144, because he has been in adverse possession of the mortgaged property for 17 years. When the appeal first came before me it was contended also on behalf of the appellant that the learned District Judge might well in granting a final decree have declared that the whole of the mortgaged property should be allotted to the shares of the mortgagors. If that contention had prevailed, the question whether the appellant had perfected a title to the property by adverse possession would not have arisen. I am however unable to agree on this point. The learned District Judge has recognised that, if possible, he ought to meet the equitable claims of the appellant by allotting the mortgaged property to the defendants 1 and 3, but he has also stated that there are practical difficulties in the way of such a course and that such an allotment cannot be made without causing hardship to the other sharers. It seems to me that in second appeal I cannot possibly interfere with such a finding which is essentially one of fact. It therefore becomes necessary to consider whether the appellant has a title by adverse possession to the suit property. That he has been in possession from 1920 is undisputed. His case is that his intention has been to enjoy the property as mortgagee not of co-sharers but of actual owners and therefore his possession with such an intention is adverse. The contention against him is that he has derived his title from two of the co-sharers and that as such he cannot prove adverse possession unless he also proves exclusion of the other co-sharers. In favour of the appellant's view of the law I have been referred to two decisions of Benches of this Court in *Sheik Abdul Gafur* v. *Ashamath Bibi*[1] and in *Linga Munisami Reddi* v.

1. (1919) 11 L.W. 31.

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Govindaswami Naicken.[1] In support of the opposite conclusion I have been referred to two other decisions of Benches of this Court in *Muthukrishna Aiyangar* v. *Sankaranarayana Aiyar*[2] and *Ramachandra Deo* v. *Balaji.*[3] In those circumstances it seems necessary to me to refer the following point of law to a Full Bench:

"Where some co-owners usufructuarily mortgage specific items of property held by the members of a Mohammadan family and the mortgagee enters into possession of the mortgaged items under his mortgage deed, is a suit to recover the share therein by other members of the same family barred by article 144 of the Limitation Act at the end of twelve years of such possession or does adverse possession begin as against the other members only from the date of ouster to their knowledge?"

The question of the period from which in case the appellant is held not to have perfected his title he must account to the plaintiffs will of course be considered if the Full Bench should decide the point referred against the appellant.

(This Second Appeal coming on for hearing in pursuance of the aforesaid Order of Reference, the Court expressed the following) :—

OPINION.

Leach, C. J.

The Chief Justice.—One A. A. Mohamed Madar Rowther and his brother A. A. Mohamed Meeran Rowther held their properties in common. Mohamed Madar was married twice. His first wife predeceased him. By her he had a son and a daughter, who are the 1st and 2nd defendants respectively. His second wife is the 2nd plaintiff and by her he had a son, the 1st plaintiff. Mohamed Madar died on the 18th June, 1916. The date of the death of his brother Mohamed Meeran is not known, but it is known that he died before his elder brother. Mohamed Meeran was survived by his wife (the 5th defendant) and two sons (the 3rd and 4th defendants). The widow and the son of Mohamed Madar filed this suit for partition of the properties of the two brothers and for their shares in Mohamed Madar's properties. One of the questions in the suit was whether a usufructuary mortgage created by the 1st and 3rd defendants in favour of the 8th defendant was binding on the plaintiffs. This mortgage was created on the 28th August, 1920, and the mortgagors purported to charge the whole of items 10 to 13 and part of item 9 of the second schedule to the plaint. The amount which had been advanced on the security of these properties was Rs. 7,250. The plaintiffs' case was that they were co-sharers and the 1st and 3rd defendants had no right to charge their interests in these properties. The suit was not filed until the 9th October, 1937 and the 8th defendant pleaded that so far as his mortgage was concerned the suit was barred by the law of limitation. The plaintiffs maintained that they had no knowledge of this mortgage and that limitation could not commence to run until they had acquired knowledge of it. It is common ground that they acquired knowledge within twelve years of the suit.

1. (1921) 42 M.L.J. 364.
2. (1914) 27 M.L.J. 600.
3. (1940) 1 M.L.J. 673: I.L.R. (1940) Mad. 245.

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There is a conflict of authority in this Court on the question whether it is necessary in order to support a plea of adverse possession that knowledge of adverse possession must be proved. The appeal came in the first instance before King, J., and in view of this conflict he has referred to a Full Bench the following question:

"Where some co-owners usufructuarily mortgage specific items of property held by the members of a Mohammadan family and the mortgagee enters into possession of the mortgaged items under his mortgage deed, is a suit to recover the share therein by other members of the same family barred by article 144 of the Limitation Act at the end of twelve years of such possession or does adverse possession begin as against the other members only from the date of ouster to their knowledge?"

The weight of authority in this Court is in favour of an affirmative answer being given to the first part of the question. There are decisions of the Calcutta and Bombay High Courts to the same effect, and support for the majority view is also to be obtained from the decision of the Privy Council in *Secretary of State for India in Council* v. *Debendra Lal Khan.*[1]

In *Sheik Abdul Gagur* v. *Ashamath Bibi*[2] a Bench of this Court (Seshagiri Aiyar and Moore, JJ.) held that possession of an alienee from one of several co-tenants becomes adverse as against the other co-tenants from the moment of the entry into possession by the alienee. This judgment was based on the decisions of this Court in *Secretary of State* v. *Vira Rayan*[3] and *Muttusami* v. *Ramakrishna*[4] and the judgment of the Full Bench of the Bombay High Court which decided *Bhavrao* v. *Rakhmin*[5] and the judgment of the Bench of the Calcutta High Court which decided *Jogendra Nath Rai* v. *Baladeo Das.*[6] In *Secretary of State* v. *Vira Rayan,*[3] Turner, C.J. and Muttuswami Aiyar, J., held that the ignorance of the owner would not prevent the accrual of title by prescription and in *Muttusami* v. *Ramakrishna,*[4] Muttuswami Aiyar, J., sitting with Wilkinson, J., held that the contention that the possession of one coparcener was the possession of all for purposes of limitation could have no application as between a purchaser from one coparcener and the other members of the family. The plaintiffs in that case were members of a joint Hindu family, who alleged that there had been a partition and a sale to them by the other members of a share in the family properties more than twelve years before the suit, and they claimed to eject a more recent purchaser. The plaintiffs did not prove that there had been a partition and it was held that the suit was barred. Decisions of this Court to the same effect were given in *Linga Munisami Reddi* v. *Govindaswami Naicken*[7] and *Palaniappa Chetty* v. *Raman Chetty.*[8]

1. (1933) 66 M.L.J. 134: L.R. 61 I.A. 78: I.L.R. 61 Cal. 262 (P.C.).
2. (1919) 11 L.W. 31.
3. (1885) I.L.R. 9 Mad. 175.
4. (1889) I.L.R. 12 Mad. 292.
5. (1898) I.L.R. 23 Bom. 137 (F.B.).
6. (1907) I.L.R. 35 Cal. 961.
7. (1921) 42 M.L.J. 364.
8. (1933) 39 L.W. 161.

In the Bombay case, *Bhavrao* v. *Rakhmin*[1] the question was asked what was the purchaser's position with reference to a coparcener's vendor or mortgagor and the answer given was:

"As he enters as owner and in right of his conveyance, his possession is adverse to them also. In the eye of the law, all the coparceners, though for the sake of convenience they may be in separate possession of portions of the joint estate, are the owners of the whole estate including the alienated portion. It may be and indeed is the case that such a purchaser by his purchase does not get a good title to the land conveyed to him by a single coparcener, but only the qualified right laid down in *Pandrang* v. *Bhaskar*[2] and he is liable under some circumstances even to be evicted if the coparceners take the requisite steps within the statutory period. Nevertheless his exclusive possession does not on that account cease to be adverse. He, entering as owner, his possession must, we think, necessarily be adverse to the true owners. Adverse possession depends upon the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested whether in a single person or in many jointly."

With these observations we find ourselves in complete agreement.

In *Jogendra Nath Rai* v. *Baladeo Das*,[3] it was said:

"Much stronger evidence, however, is required to show an adverse possession held by a tenant in common than by a stranger; a co-tenant will not be permitted to claim the protection of the Statute of Limitations, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him; it must further be established that the fact of adverse holding was brought home to the co-owner either by information to that effect given by the tenant in common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and *disseisin* are intended to be asserted."

But it was also pointed out that while the possession of one co-owner is, in itself, rightful, and does not imply hostility the possession is different when a stranger is in possession. The possession of a stranger in itself indicates that his possession is adverse to the true owners.

The decisions of this Court which are in conflict with the decisions already cited are *Muthukrishna Aiyangar* v. *Sankaranarayana Aiyar*,[4] *Govindasami Chettiar* v. *Kothandapani Chettiar*,[5] *Ramachandra Deo* v. *Balaji*,[6] *Venkatarama Aiyar* v. *Subramania Sastri*[7] and *Moidin* v. *Kunhalikutti*.[8] In *Muthukrishna Aiyangar* v. *Sankaranarayana Aiyar*,[4] Ayling and Tyabji, JJ., held that before possession could be adverse to cosharers knowledge of the adverse possession must be brought home to them. The learned Judges did not consider the earlier decisions of this Court where contrary opinions were expressed and their judgment was criticised by the Bench of this Court which decided *Linga Munisami Reddi* v. *Govindaswami Naicken*.[9] The decision in *Govindasami Chettiar* v. *Kothandapani Chettiar*[5] was

1. (1898) I.L.R. 23 Bom. 137 (F.B.).
2. (1871) 11 Bom.H.C.R. 72.
3. (1907) I.L.R. 35 Cal. 961.
4. (1914) 27 M.L.J. 600.
5. (1926) 52 M.L.J. 203.
6. (1940) 1 M.L.J. 673: I.L.R. (1940) Mad. 245.
7. (1923) 20 L.W. 122.
8. (1935) 42 L.W. 798.
9. (1921) 42 M.L.J. 364.

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given by Odgers, J. He certainly referred to the conflict in authority, but as he had already expressed an opinion in favour of the necessity of proving knowledge he adhered to it. *Ramachandra Deo* v. *Balaji*[1] was decided by Burn and Stodart, JJ., but they did not consider the other cases and contented themselves with a bare statement that adverse possession must be brought to the knowledge of the owner. *Moidin* v. *Kunhalikutti*[2] was decided by Pandrang Row., J., and his judgment is open to the same criticism as the judgment in *Ramachandra Deo* v. *Balaji*.[1] The judgment in *Venkatarama Aiyar* v. *Subramania Sastri*[3] is not easy to follow. Notwithstanding that the learned Judges quoted with approval *Bhavrao* v. *Rakhmin*,[4] they seem to indicate that knowledge should be proved.

Possession to be adverse must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor, as the Privy Council pointed out in *Secretary of State for India in Council* v. *Debendra Lal Khan*.[5] As already indicated we are of the opinion that the judgment lends strong support for the majority opinion of this Court. In that case a zamindar claimed against the Crown title to a fishery in a navigable river by reason of adverse possession. The learned counsel who appeared for the Crown advanced the argument that adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there was no authority for this requirement. It was sufficient that possession was overt and without any attempt at concealment so that the person against whom time was running ought if he exercised due vigilance to be aware of what was happening.

When one of several co-sharers lets into possession a stranger who proceeds to cultivate the land for his own benefit the other co-sharers must, unless they deliberately close their eyes, know of what is going on, but if they are so regardless of their own interests they must take the consequences. Where a person who is in possession under a usufructuary mortgage granted by one of several coparceners remains in possession of the land and cultivates it for years, a position which we have here, there can be no doubt that the requirements of continuity, publicity and extent for adverse possession are fully complied with. Consequently we would answer the first part of the question referred in the affirmative and the latter part in the negative. It follows that the decisions in *Muthukrishna Aiyangar* v. *Sankaranarayana Aiyar*,[6] *Ramachandra Deo* v. *Balaji*,[1] *Venkatarama Aiyar* v. *Subramania Sastri*,[3] *Moidin* v. *Kunhalikutti*[2] and *Govindasami Chettiar* v. *Kothandapani Chettiar*,[7] must so far as they indicate a contrary opinion be deemed to be overruled.

1. (1940) 1 M.L.J. 673: I.L.R. (1940) Mad. 245.
2. (1935) 42 L.W. 798.
3. (1923) 20 L.W. 122.
4. (1898) I.L.R. 23 Bom. 137 (F.B.).
5. (1933) 66 M.L.J. 134: L.R. 61 I.A. 78: I.L.R. 61 Cal. 262 (P.C.).
6. (1914) 27 M.L.J. 600.
7. (1926) 52 M.L.J. 203.

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In order that there may be no misunderstanding we will add that the interest which the appellant has acquired is the interest of a usufructuary mortgagee. He has not acquired a full title to the property. As a matter of fact the learned advocate for the appellant has not suggested otherwise.

The costs of this reference will be made costs in the appeal.

K. S. ——— *Reference answered.*

IN THE FEDERAL COURT.

[*Appellate Jurisdiction.*]

PRESENT:—SIR MAURICE GWYER, *Chief Justice*, VARADACHARIAR AND BEAUMONT, JJ.

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Province of Madras *v.* Paidanna and Sons.

The Province of Madras .. *Appellant**

v.

Boddu Paidanna and Sons .. *Respondents.*

Madras General Sales Tax Act, 1939—*Levy of tax on turnover of sales—Duty on manufactured goods—Seller of groundnut oil and cake also manufacturer—Levy of tax—Whether a duty on excise—Power of Provincial Legislature—Difference between Australian and Indian Constitution Acts—Interpretation of statutes—Two complementary powers—Limits of competing powers—Difference between duty of excise and turnover tax.*

The Madras General Sales Tax Act, 1939, provides that, subject to the provisions of the Act, every person who carries on the business of buying or selling goods, is to pay in each year a tax on his turnover, if that turnover is not less than Rs. 10,000. The business of the respondents consisted of the purchase of groundnuts for the purpose of extracting oil from the kernels of the nuts and the making of groundnut cake out of the residue. They themselves sold the oil and cake in the first instance. The assessing authority levied tax on the respondents both in respect of their purchase of groundnuts and of their sales of oil and cake, holding that the purchase of groundnuts was a business distinct from the business of manufacturing oil and cake. The respondents having paid the tax levied under protest sued for a declaration that the Act was *ultra vires* of the Madras Legislature and for refund of the amount paid. The Madras High Court held that the tax on the first sale of the goods manufactured was a duty of excise which the Madras Government was not competent to impose. On appeal,

Held, that the levy of the tax on the first turnover of the manufactured goods was not illegal and that the provisions of the Madras Sales Tax Act enabling such a levy were not *ultra vires*. The power of the Provincial Legislatures to levy a tax on the sale of goods extends to sales of every kind, whether first sales or not.

A duty of excise is a duty leviable with respect to specified goods; but where a turnover tax is leviable at a specified rate on the aggregate sum produced by the sale of a number of different articles or commodities, it is a tax levied at a specified rate on each sale of those goods or commodities.

Central Provinces Case, (1939) F.C.R. 18: 2 F.L.J. 6, considered.

Under the Australian Constitution the power to impose duties of excise is the exclusive right of the Commonwealth Parliament; the residuary taxing power remains in the States. In the Indian Constitution Act the whole of the taxing power in this particular sphere is expressly apportioned between the Centre and the Provinces, to the one being assigned the power to impose duties of excise. to the other taxes on the sale of goods. It is natural enough when considering the ambit of an express power in relation to an

*Case No. 3 of 1942. 8th May, 1942.

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unspecified residuary power, to give a broad interpretation to the former at the expense of the latter. The case, however, is different where, as in the Indian Act, there are two complementary powers, each expressed in express and definite terms. There can be no reason given in such a case for giving a broader interpretation to one power rather than to the other; and there is no reason for extending the meaning of the expression "duties of excise" at the expense of the Provincial power to levy taxes on the sale of goods.

Decision of the Madras High Court in *The Province of Madras* v. *Paidanna & Sons,* (1941) 2 M.L.J. 607: I.L.R. (1941 Mad. 874, reversed.

Appeal from a judgment of the High Court of Madras reported as *The Province of Madras* v. *Paidanna & Sons,* (1941) 2 M.L.J. 607: I.L.R. (1941) Mad. 874.

Sir Alladi Krishnaswami Aiyar, Advocate-General of Madras (*N. Rajagopala Aiyangar* with him), instructed by *B. Banerji,* Agent, for Appellant.

T. R. Venkatarama Sastri (*C. Krishnaswami* with him), instructed by *Ganpat Rai,* Agent, for Respondents.

Interveners:

Sir Brojendra Mitter, Advocate-General of India (*H. R. Kazimi* with him), instructed by *K. Y. Bhandarkar,* Agent.

Sir Asoka Roy, Advocate-General of Bengal (*H. K. Bose* with him), instructed by *B. Banerji,* Agent.

Dr. Narain Prasad Asthana, Advocate-General of the United Provinces (*Sri Narain Sahai* with him), instructed by *Sumair Chand Jain Raizada,* Agent.

The Court delivered the following Judgment:—

Gwyer, C. J.

Gwyer, C. J.—In this case the appellants are the Province of Madras, who appeal against a Judgment of the Madras High Court, dated 5th September, 1941, in which it was held that certain taxes which had been levied on the respondents under the Madras General Sales Tax Act, 1939 (to which for convenience we refer hereafter as the Madras Act) were in the nature of duties of excise and therefore beyond the competence of the Madras Legislature to impose. In view of the importance of the question to the Provinces generally in more than one of which legislation similar to the Madras Act has already been enacted, we acceded to the application of the Advocates-General of Bengal and the United Provinces to be allowed to appear at the hearing and to support the arguments of the Advocate-General of Madras. The Advocate-General of India, to whom we had caused notice of the proceedings to be sent, also appeared and addressed arguments to us in support of the Judgment of the High Court. We therefore had the advantage of a very full discussion of all points which arise in the case and we are indebted to counsel for the assistance which they have afforded us.

The respondents carry on business at Vizianagaram in the Province of Madras. Their business consists of the purchase of groundnuts for the purpose of extracting oil from the kernels of the nuts and the making of groundnut cake out of the residue. They sell this oil and cake, and, since they are themselves the manufacturers, it follows that each sale which they effect is the first sale of the commodity after its manufacture or production.

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The Madras Act provides that, subject to the provisions of the Act, every dealer, that is to say, every person who carries on the business of buying and selling goods, is to pay in each year a tax on his turnover, if that turnover is not less than Rs. 10,000, the tax being at a flat rate of five rupees (afterwards reduced to four) on a turnover between Rs. 10,000 and Rs. 20,000 and varying with the amount of the turnover on a turnover of more than Rs. 20,000. The expression "turnover" is defined as meaning the aggregate amount for which goods are either bought or sold by a dealer, whether for cash or for deferred payment or other valuable consideration, with certain exceptions not here material. The expression 'goods' is defined as meaning all kinds of movable property, other than actionable claims, stocks and shares and securities, and includes all materials, commodities and articles. The Act further provides that the buyer and seller are not both to be taxed in respect of the same transaction of sale, but only one of them, as determined by rules made under the Act; and that, when the amount for which any goods have been bought by a dealer has been included in his turnover, the amount for which the same goods are sold by him is not to be included in his turnover for the purposes of the Act. The turnover for all purposes of the Act is to be determined in accordance with, and the tax is to be assessed, levied and collected in such manner and in such instalment as may be prescribed by, rules made for the purpose by the Provincial Government. There are various other provisions in the Act, mostly dealing with the machinery of assessment and collection; but nothing turns upon them in the present appeal.

The assessing authority under the Act assessed the respondents to tax both in respect of their purchase of groundnuts and of their sales of oil and cake, holding that the purchase of groundnuts was a business distinct from the business of manufacturing oil and cake. Accordingly the sum of Rs. 160-11-0 was demanded from the respondents by way of tax, and was paid by them under protest. The respondents then took proceedings in the Court of the District Munsiff at Vizianagaram for a declaration that the Madras Act and certain rules made thereunder were *ultra vires* the Madras Legislature and for an order directing a refund of the sum of Rs. 160-11-0, together with Rs. 3 interest thereon. The learned Munsiff gave judgment in favour of the respondents on both points, holding that a tax on the first sale of goods manufactured in the Province was a duty of excise which the Madras Government were not competent to impose. There was an appeal to the District Court at Vizagapatam, but, on the application of the Advocate-General of Madras, the appeal was transferred to the High Court. A Bench of the High Court, composed of the Chief Justice and Chandrasekhara Ayyar, J., upheld the judgment of the lower Court; and it is from the High Court's decision that the appeal now comes to us.

Under the Constitution Act the Federal Legislature has an exclusive power to impose duties of excise (List I, entry No. 45) and the Provincial Legislature an exclusive power to impose

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taxes on the sale of goods (List II, entry No. 48). The relation of a duty of excise to a tax on sales was much discussed in *The Central Provinces case,*[1] in which this Court delivered an advisory opinion on the question whether an Act imposing a tax on retail sales of petrol was within the competence of the Central Provinces Legislature. All the members of the Court were of opinion that the Legislature was competent to impose such a tax, though their reasons differed. Jayakar, J., held that all taxes on the sale of goods "for purposes of consumption", by which he presumably meant taxes on retail sales, ought to be regarded as exclusively within the competence of the Provincial Legislature, provided that they were in no way connected with the production or manufacture of the goods within the Province; but that all other taxes on the sale of goods were duties of excise and therefore exclusively within the competence of the Central Legislature. The other two members of the Court were not prepared to go to these lengths, and in effect drew the dividing line between the Central and Provincial spheres at the point of manufacture or production. They were of opinion that, on the true construction of entry No. 45 in List I and entry No. 48 in List No. II, the power of the Central Legislature to impose duties of excise was a power to impose duties on the manufacturer or producer of the goods and did not extend further, the power to impose a tax upon the sale of goods after manufacture or production being reserved to the Provinces. They left open however the question on which side of the line a tax upon the first sales of goods manufactured or produced in the Province was to be regarded as falling. Thus one judgment would confine the power of the Central Legislature to the imposition of duties "on the manufacturer or producer of the excisable articles, *or at least at the stage of, or in connection with, manufacture or production*". In the other this sentence is to be found:

> "For all practical purposes, it (that is, a tax on first sales) is a tax on the manufacturer or producer, and the burden is in the first instance imposed on him, though of course, it being an indirect imposition, he could pass it on; but the essence is that the tax is imposed on a sale by the producer or manufacturer and not on a sale by any subsequent vendor".

The learned Judge, the late Sulaiman, J., added that, though it was not necessary to decide the question, there might be some difficulty in upholding a provincial tax on first sales. In the present appeal we have to answer the question which was thus left open in the earlier case.

We may here refer to a contention raised by counsel on behalf of the appellants that a turnover tax such as is imposed by the Madras Act is not a tax on specific goods and that therefore the expression "duty of excise" could never in any circumstances be appropriate to it. It may be conceded that a duty of excise is a duty leviable with respect to specific goods; but where a turnover tax is leviable at a specified rate on the aggregate sum produced by the sale of a number of different articles or commo-

1. (1939) 1 M.L.J. (Supp.) 1: 2 F.L.J. 6: (1939) F.C.R. 18.

dities, then it seems to us that it is a tax levied at the specified rate on each sale of those goods or commodities. A system of turnover taxation is conceivable where it may not be easy, or even possible, to identify the tax on a particular sale; but no such difficulty arises in a case under the Madras Act, at least if the turnover exceeds Rs. 20,000 per annum, as that of the respondents does. We do not think therefore that there is any substance in the appellants' contention.

In *The Central Provinces case,*[1] the opinions expressed were advisory opinions only, but we do not think that we ought to regard them as any less binding upon us on that account. We accept therefore the general division between the Central and Provincial spheres of taxation which commended itself to the majority of the Court in that case. They did not reach their conclusions by assigning any particular technical meaning to the expressions "duty of excise" or "tax on the sale of goods", but rather by construing the language in which the taxing powers of the Centre and Provinces respectively are conferred, in such a way as to give effect to what appeared to them to be the scheme of the Act and to reconcile the conflict which might otherwise arise between two independent taxing authorities. They recognised that the expression "duty of excise" is wide enough to include a tax on sales; but where power is expressly given to another authority to levy a tax on sales, it is clear that "duty of excise" must be given a more restricted meaning than it might otherwise bear. On the other hand the fact that "duty of excise" is itself an expression of very general import is no reason at all for refusing to give to the expression "tax on sales" the meaning which it would ordinarily and naturally convey. In these circumstances the question at issue in the present appeal appears to us to lie within a very small compass.

The duties of excise which the Constitution Act assigns exclusively to the Central Legislature are, according to *The Central Provinces case,*[1] duties levied upon the manufacturer or producer in respect of the manufacture or production of the commodity taxed. The tax on the sale of goods, which the Act assigns exclusively to the Provincial Legislatures, is a tax levied on the occasion of the sale of the goods. Plainly a tax levied on the first sale must in the nature of things be a tax on the sale by the manufacturer or producer; but it is levied upon him *qua* seller and not *qua* manufacturer or producer. It may well be that a manufacturer or producer is sometimes doubly hit; but so is the taxpayer in Canada who has to pay income-tax levied by the Province for Provincial purposes and also income-tax levied by the Dominion for Dominion purposes; see *Caran* v. *The King*[2] and *Forbes* v. *A.-G. for Manitoba.*[3] If the taxpayer who pays a sales tax is also a manufacturer or producer of commodities subject to a central duty of excise, there may no doubt be an overlapping in one sense; but there is no overlapping in law. The two taxes

1. (1939) 1 M.L.J. (Supp.) 1: 2 F.L.J. 6: (1939) F.C.R. 18.
2. (1924) A.C. 999.
3. (1937) A.C. 260.

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which he is called on to pay are economically two separate and distinct imposts. There is in theory nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed or given away. A taxing authority will not ordinarily impose such a duty, because it is much more convenient administratively to collect the duty (as in the case of most of the Indian Excise Acts) when the commodity leaves the factory for the first time, and also because the duty is intended to be an indirect duty which the manufacturer or producer is to pass on to the ultimate consumer, which he could not do if the commodity had, for example, been destroyed in the factory itself. It is the fact of manufacture which attracts the duty, even though it may be collected later; and we may draw attention to the Sugar Excise Act in which it is specially provided that the duty is payable not only in respect of sugar which is issued from the factory but also in respect of sugar which is consumed within the factory. In the case of a sales tax, the liability to tax arises on the occasion of a sale, and a sale has no necessary connexion with manufacture or production. The manufacturer or producer cannot of course sell his commodity unless he has first manufactured or produced it; but he is liable, if at all, to a sales tax because he sells and not because he manufactures or produces; and he would be free from liability if he chose to give away everything which came from his factory.

In our opinion the power of the Provincial Legislatures to levy a tax on the sale of goods extends to sales of every kind, whether first sales or not; and we regret that we are unable to agree with the contrary opinion which has been expressed by the High Court. The gist of the judgment of the High Court is to be found in the following passage:—

"What the Court has to decide, in the first instance, is whether a tax on the sale of goods by the manufacturer or producer is so connected with their manufacture or production as to amount to an excise duty. The High Court of Australia has said that a tax imposed on the first sale of goods is so connected with their production that it is an excise duty, and no reason has been advanced in the course of the argument in this case to induce us to think otherwise. The tax operates on the goods themselves and it is imposed before they leave the hands of the manufacturer or producer. In the normal course he is certainly not going to part with his goods until a contract of sale has been entered into. This being the case, it seems to us that the tax is intimately connected with the manufacture or production of the goods. We hold that a Provincial Legislature in India has no power to tax a sale by the manufacturer or producer, as for the reasons given this would mean the imposition of an excise duty and the assumption of a power vested only in the Centre".

We do not think, for reasons which we give hereafter, that the Australian case referred to has any bearing on the question which we are now called on to determine. That question is this: assuming the right of the Central Legislature to tax the production of a commodity and the right of the Provincial Legislature to tax its sales, can a good reason be shown for excluding a particular category of sales on the ground only that they are sales by the producer? According to the High Court a tax on the first sale of goods is so connected with their production that it is an excise

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duty; but, with great respect to the Court, that appears to us to be hardly the question. Every tax on the sale of goods produced in India is in a sense an excise duty, whether the sale is the first, second or third, though an excise duty is not necessarily a tax on sales; and the High Court should have formulated their proposition thus: a tax on the first sale of goods is so connected with their production that it cannot properly be described as, and is not in fact, a tax on sale. Stated in this way, the proposition is surely difficult to sustain. We may recall that in 1935, when the Constitution Act was passed, the distinction between a producer's or manufacturer's sales tax and sales taxes (including retail sales taxes) of other kinds was familiar to economists and those concerned with public finance (see *Findlay Shirras*: *Science of Public Finance*, Vol. II, Ch. 25); and it is therefore not without significance that Parliament did not think fit to confine the provincial taxing power in terms to sales taxes other than taxes on first sales. It is also material, even if not necessarily conclusive, to point out that the judgment of the High Court would deprive the Provincial Legislature of the whole yield of taxes on first sales, and not merely of the tax on the first sale of commodities which are also subject to a duty of excise; and it would do so without in practice conferring any corresponding benefit on the Central fisc, since for plain reasons of convenience the number of commodities on the production of which it is administratively worth while to impose an excise duty will always be very limited.

Our attention was drawn to a number of Canadian, Australian and American decisions which were alleged to throw light upon the principles applicable to this appeal, and it is desirable that we should say something about them. They are not of course binding on us; but, as was said in *The Central Provinces case*,[1] such decisions, if relevant, will always be listened to in this Court with attention and respect.

The Canadian cases which were cited do not seem to afford any assistance, since analogous problems in Canada are always concerned with questions of direct and indirect taxation; and if a Provincial tax is held to be an indirect tax, it is unnecessary for the Court to consider whether it may not also be a duty of excise: see, for example *A.-G. for British Columbia* v. *The Canadian Pacific Railway Co.*,[2] where a tax on every person purchasing within the Province fuel oil for the first time after its manufacture in, or importation into, the Province was held to be invalid as an indirect tax, and the question whether it might not also be bad as an excise duty was left unanswered. In contrast to the case just cited we may refer to *A.-G. for British Columbia* v. *Kingcome Navigation Company*,[3] in which a fuel oil tax imposed by a Province upon every consumer of fuel oil according to the quantity which he had consumed was held to be valid as a direct tax, because it was demanded from the very persons who it was intended or desired should pay it.

1. (1939) 1 M.L.J. (Supp.) 1: 2 F.L.J. 6: (1939) F.C.R. 18.
2. (1927) A.C. 934.
3. (1934) A.C. 45.

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The Australian cases are rather more in point, and in particular the High Court laid great stress on *The Commonwealth Oil Refineries, Ltd.* v. *South Australia*[1] which was also discussed at length in *The Central Provinces case.*[2] In this Australian case the validity of a so-called income-tax of three pence per gallon imposed by a State on vendors of motor spirit was considered, a vendor being defined as a person selling or delivering motor spirit within the State to persons within the State for the first time after its entry into, or its manufacture in, the State. This was held to be a duty of excise and therefore not within the competence of the State Legislature, the power of the Commonwealth Parliament to impose duties of customs and excise being an exclusive one. Some of the learned Judges who decided the case, it is true, were of opinion that it was an excise duty because it was connected with the production of the commodity, but others took a wider view: see especially the judgment of Higgins, J. (at p. 435) where he says:

> "For the purpose of section 90 and our constitution as a whole, customs duty is a duty on importation or exportation whether by land or by sea; whereas excise duty means a duty on the manufacture, production, etc., in the country itself; and it matters not whether the duty is imposed at the moment of actual sale or not, or sale and delivery, or consumption."

In *Matthews* v. *The Chicory Marketing Board,*[3] a levy of £1 on producers for every half acre of land planted with chicory was held by a majority of the Court to be a duty of excise. A very full account of the history of excise duties is given by Dixon, J., in his judgment in that case, and the learned Judge observes:

> "It should not be overlooked that so far there is no direct decision (*i.e.*, by the Australian Courts) inconsistent with the view that a tax on commodities may be an excise although it is levied not upon, or in connection with, production, manufacture or treatment of goods or the preparation of goods for sale or for consumption, but upon sale, use or consumption and is imposed independently of the place of production (*cf.* the judgment of Rich, J., in *The Commonwealth Oil Refineries, Ltd.* v. *South Australia*[1] and *John Fairfax & Sons, Ltd. and Smith's Newspapers, Ltd.* v. *New South Wales.*[4] What is decided is that to be an excise the tax must be imposed in respect of commodities'.

And then later:

> "The basal conception of an excise in the primary sense which the framers of the constitution are regarded as having adopted is a tax directly affecting commodities. . . . To be an excise the tax must be levied 'upon goods,' but those apparently simple words permit of much flexibility in application. The tax must bear a close relation to the production or manufacture, the sale or the consumption of goods, and must be of such a nature as to affect them as the subjects of manufacture or production or as articles of commerce" (pp. 303, 304).

Having regard to the above opinions, we find it impossible to say that the expression, "duties of excise", even in Australia is limited to duties imposed in connection with the production of a commodity alone. We should be disposed to say on the contrary that

1. (1926) 38 C.L.R. 408.
2. (1939) 1 M.L.J. (Supp.) 1: 2 F.L.J. 6: (1939) F.C.R. 18.
3. (1938) 60 C.L.R. 263.
4. (1927) 39 C.L.R. 139.

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in Australia all taxes on the sale of commodities are, or may be regarded as, duties of excise; but whether this be so or not, it is clear that *The Commonwealth Oil Refineries' case*[1] cannot be treated as having the conclusive authority which the High Court of Madras seem to have attributed to it. We should be unwilling also for another reason to adopt blindly the Australian decisions. Under the Australian Constitution power to impose duties of excise is, as we have said, the exclusive right of the Commonwealth Parliament; the residuary taxing power remains in the States. In the Indian Constitution Act the whole of the taxing power in this particular sphere is expressly apportioned between the Centre and the Provinces, to the one being assigned the power to impose duties of excise, to the other taxes on the sale of goods. It is natural enough, when considering the ambit of an express power in relation to an unspecified residuary power, to give a broad interpretation to the former at the expense of the latter; and this indeed is the principle upon which the Judicial Committee have for the most part interpreted sections 91 and 92 of the British North America Act. The case however is different where, as in the Indian Act, there are two complementary powers, each expressed in precise and definite terms. There can be no reason in such a case for giving a broader interpretation to one power rather than to the other; and there is certainly no reason for extending the meaning of the expression "duties of excise" at the expense of the Provincial power to levy taxes on the sale of goods.

Lastly, the well-known American case of *Brown* v. *The State of Maryland*[2] was cited to us. The State of Maryland had passed an Act prohibiting the importers of foreign goods from selling their goods without taking out a licence, for which fifty dollars had to be paid. This Act was held to be repugnant to the provision in the Constitution which provides that

> "no State shall, without the consent of Congress, allow any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

In the course of his judgment, Marshall, C.J., after observing that whatever might be the motive which had induced the prohibition against duties on imports or exports, said:

> "It is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer."

If a licence to sell is invalid for the above reasons, a tax on the first sale must be no less invalid; and it follows from the judgment of Marshall, C.J., and has ever since been held to be the law of the United States, that a duty of this kind is to be regarded as so intimately connected with the act or transaction of impor-

1. (1926) 38 C.L.R. 408.
2. (1827) 12 Wheat. 419.

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tation as to be itself an impost or duty on imports and, therefore, beyond the power of any State in the Union to impose. We should be temerarious indeed, if we expressed any opinion upon the reasoning of that great Judge, even though we might find it easier to follow the reasoning of Thompson, J., in his dissenting judgment; but we have no occasion to do so. The provisions which were being considered in *Brown* v. *The State of Maryland*[1] were very different from those which are before us in the present appeal. There is in the first place, as in the Australian Constitution, a specific reservation of certain taxing powers to Congress, with the residuary powers left to the States; and what we have already said on this point in connection with the Australian decisions is equally applicable here. Next, it is to be observed that the American Constitution also provides that Congress alone has power "to regulate commerce with foreign nations, among the several States, and with the Indian tribes"; and it was held that the Maryland tax was no less repugnant to this provision also. Marshall, C.J., asked:

> "To what purposes should the power to allow importation be given, unaccompanied with the power to authorise the sale of the thing imported? . . . Congress has a right, not only to authorise importation, but to authorise the importer to sell . . . What does the importer purchase, if he does not purchase the privilege to sell?"

On this view of the Commerce clause, it would indeed be difficult to recognise the right of the State to impose a tax upon the first sale of the commodity, at any rate so long as it remained in the importer's hands. In the Indian Constitution Act no such question arises; and the right of the Provincial Legislatures to levy a tax on sales can be considered without any reference to so formidable a power vested in the Central Government. Lastly, the prohibition in the American Constitution is against the laying of "any imposts or duties on imports or exports"; the prohibition is not merely against the laying of duties of customs, but is expressed in what we conceive to be far wider terms; and it does not appear to us that it would necessarily follow from the principle of the Maryland decision that in India the payment of customs duty on goods imported from abroad or the payment of an excise duty on goods manufactured or produced in India can be regarded as conferring some kind of licence or title on the importer or manufacturer to sell his goods to any purchaser without incurring a further liability to tax. That was the view which commended itself to the Court in *Brown* v. *The State of Maryland*[1] and it was a view adopted and argued before us. The analogy with the American case is an attractive one; but for the reasons which we have given we are wholly unable to accept it.

I may perhaps be myself responsible for some of the confusion which seems to have arisen, by reason of the suggestion which I made in *The Central Provinces case*,[2] that the Central Legislature should be regarded as having power

1. (1827) 12 Wheat. 419.
2. (1939) 1 M.L.J. (Supp.) 1: 2 F.L.J. 6: (1939) F.C.R. 18.

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"to impose duties on excisable articles before they become part of the general stock of the Province, that is to say, at a stage of manufacture or production, and the Provincial Legislature an exclusive power to impose a tax on sales thereafter".

In using these words I intended to do no more than suggest a convenient dividing line between the two spheres of jurisdiction; but I certainly did not mean to elevate the dividing line into a legal principle, the application of which might attract those numerous American authorities, of which perhaps *Brown* v. *The State of Maryland*[1] was the first, where the question has been considered at what point commerce ceases to be inter-State or foreign commerce and becomes the domestic commerce of a State and taxable by it. I should much regret if any contribution of mine to the elucidation of the problems which come before this Court were thought to have included the introduction of some kind of "original-package" doctrine and all the refinements and complications which that doctrine has brought in its train in the Courts of America.

We should add that neither the appellants nor the respondents desired to adduce arguments on certain issues in the case which the High Court left undecided, because on the view which they (the High Court) took of the matter it was unnecessary to decide them. We do not in these circumstances think it obligatory upon us to express any opinion upon those issues.

The appeal will be allowed and the case remitted to the High Court of Madras with directions to substitute a decree dismissing the respondents' suit. We think that the appellants are entitled to their costs in this Court and in the two Courts below.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

S. T. K. M. Lakshmanan Chettiar and others .. *Petitioners** (*Plaintiffs*)

v.

Nalla Sevugam Servai *alias* Nalla Sivan Servai .. *Respondent* (*Defendant*).

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Limitation Act (*IX of* 1908), *articles* 52 *and* 85—*Scope and applicability.*

The mere supply of different goods on different dates cannot give rise to a fresh period of limitation from the date of the last supply. If no period of credit was agreed upon article 52 of the Limitation Act would apply and limitation would start from the date of the delivery of the goods on each occasion unless the case can be brought within the ambit of article 85.

Kedar Nath Mitra v. *Dinabandhu Saha*, (1915) I.L.R. 42 Cal. 1043, not followed.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of

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1. (1827) 12 Wheat. 419.

*C.R.P. No. 1645 of 1941. 27th February, 1942.

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the District Munsiff of Ramnad, dated the 29th March, 1941 and passed in S.C.S. No. 499 of 1940.

N. Somasundaram for Petitioners.

V. C. Viraraghavan for Respondent.

The Court delivered the following

JUDGMENT.—The only point which I have been invited to decide in this revision is one of limitation. The plaintiffs dealt in cinder while the defendant had a brick kiln of his own. Dealings started between them in 1927. They consisted in the purchase of cinder. The defendant borrowed cash as well from the plaintiffs occasionally. The last three items which are debited in the plaintiffs' accounts to the defendant are:

1. Rs. 120 on the 28th July, 1936 for price of 20 carts of cinder;
2. Rs. 20 on the 27th February, 1937 for money advanced in cash; and
3. Rs. 115-8-0 on the 20th July, 1938 for the price of 21 carts of cinder.

The plaintiffs were in need of money, it seems for purchasing some bulls and made a demand from the defendant on the 3rd March, 1938 for payment. Instead of paying cash in or towards the discharge of his account, the defendant sold two bulls to the plaintiffs for a sum of Rs. 220. Bricks to the value of Rs. 19-10-0 had been sold by the defendant to the plaintiffs on the 13th April, 1935. The credit of these two items in the plaintiffs' account led to the contention on their behalf that there was a mutual, current and open account within the meaning of article 85 of the Limitation Act and limitation for the suit instituted by them on the 16th November, 1940 started from the close of the year 1938 in which the last item was entered in the account.

The second contention advanced on behalf of the plaintiffs was that in so far as the last item of Rs. 115-8-0 was due in respect of cinder sold and delivered in July, 1938, the suit to that extent would, at all events, be within time under article 52 of the Limitation Act.

These contentions were not accepted by the lower Court. The first one was overruled as the lower Court came to the conclusion that the account between the parties could not be regarded as mutual, open and current within the meaning of article 85 and the second as the lower Court took the view that the last two payments were made by the defendant towards the price of cinder supplied to him on the 30th July, 1938, and were agreed to be appropriated by the plaintiffs towards that item. In the result the plaintiffs' suit was dismissed.

The plaintiffs have consequently come up in revision and their learned counsel has, in addition to the contentions advanced in the Court below, put forward a further contention that the various items debited to the defendant were so connected together as to show that they were continuous so that the previous items

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when not paid must be taken to have been united with the last item debited to the defendant and must be held to form one continuous demand.

After hearing learned counsel for the parties I am of opinion that the first contention advanced on behalf of the plaintiffs in the lower Court was incorrect and was rightly disallowed. The letter Ex. B, on which reliance was placed on behalf of the plaintiffs, does not show that the sale of the bulls by the defendant was an independent transaction or created an independent obligation. On the contrary it clearly shows that the sale was made to the plaintiffs in partial discharge of the debt due to them at that time. This amounted to Rs. 476-9-0. The request for a sum of Rs. 120 in the defendant's letter Ex. B was simply a request for a fresh loan from the plaintiffs. At no point of time was any balance due to the defendant and it could not therefore be said that there was any reciprocal demand on his behalf against the plaintiffs. The delivery of bulls of the value of Rs. 220 or the supply of bricks in April, 1935 in partial discharge of the moneys due to the plaintiffs cannot, in my opinion, alter the character of the account and bring it within the ambit of article 85 of the Limitation Act.

Let me now deal with the third contention. It was advanced on behalf of the plaintiffs for the first time in this Court. It appears to be borne out by a Calcutta decision in ***Kedar Nath Mitra*** v. *Dinabandhu Saha* [1] to which no less an eminent Chief Justice than Sir Lawrence Jenkins was a party. But there are several difficulties in applying that decision to this case or even in accepting it in regard to the point in support of which it is cited. I say so with great deference to the learned Chief Justice and to the other learned Judge who was a party to that decision. Firstly, there is nothing on the record in this case to suggest that the dealings between the parties were intended to be continuous and the various items debited to the defendant were so united as to form part of one item or of one demand. Secondly, it is not easy to see how, in the absence of a definite provision in the Limitation Act, could the period of limitation in this case begin to run from the date on which cinder was last supplied. The mere supply of different goods on different dates cannot give rise to a fresh period of limitation from the date of the last supply. If no period of credit was agreed upon, article 52 of the Limitation Act would obviously apply and limitation would start from the date of the delivery of the goods on each occasion unless of course the case can be brought within the ambit of article 85. Whatever the English law on the basis of which the learned Judges came to the decision in *Kedar Nath Mitra* v. *Dinabandhu Saha*,[1] there is nothing in the Indian Limitation Act that would warrant, in my judgment, that conclusion. The advance of monies occasionally in this case or the supply of cinder on various dates do not, in my opinion, form one connected whole for the purpose of calculating limitation.

There was however no material on the record which would have justified the lower Court in holding that the sum of

1. (1915) I.L.R. 42 Cal. 1043.

Lakshmanan Chettiar v. Nalla Sevugam Servai.

Rs. 115-8-0 was appropriated by the plaintiffs specifically towards the price of the goods supplied on the 20th July, 1938. It may be that the defendant had the idea of discharging the debt that he had incurred by the purchase of 21 carts of cinder on the 20th July, 1938. But there is no evidence on the record that he had given any definite instructions to the plaintiffs to appropriate that sum towards that amount or that the plaintiffs had given credit to the defendant towards that particular item. In the absence of any such evidence the payments by the defendant would have to be regarded as payments generally towards his account irrespective of the consideration whether the items in the plaintiffs' accounts were barred by limitation or not. On that point the finding of the lower Court was wrong and must be set aside. The sum of Rs. 115-8-0 would thus be, if otherwise proved to be correct, within limitation.

For the above reasons, I must accept the revision and send the case back to the lower Court for disposal on the merits. The parties will bear their costs of this revision and the costs in the lower Court will be costs in the cause.

K.S. ——— *Revision accepted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

Sri Raja Sobhanadri Apparao Bahadur Garu .. *Appellant** (*Respondent*)

v.

Uppala Appanna Sastri *alias* Annappa Sastri .. *Respondent* (*Appellant*).

Sri Raja Sobhanadri Apparao Bahadur Garu v. Appanna Sastri.

Madras Estates Land Act (I of 1908), sections 5 and 125—Amending provision in section 125 inserted in 1934—Whether merely declaratory of pre-existing law—Arrears of rent after suit—Charge whether operative.

Section 125 of the Madras Estates Land Act, as amended in 1934, has not effected any change in the law but has merely made the pre-existing law clearer. In a case governed by section 5 of the Act before the amendment the charge will not operate in respect of the arrears of rent which have accrued due between the date of the landholder's suit and the sale of the property when it is sold in execution of the decree for rent.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Wadsworth, J., dated 23rd January, 1941 and passed in S.A. No. 118 of 1938 [reported in (1941) 2 M.L.J. 947] preferred against the decree of the Court of the Subordinate Judge of Bezwada in A.S. No. 40 of 1936 (O.S. No. 644 of 1934, District Munsiff's Court, Bezwada).

P. Satyanarayana Rao for Appellant.

P. Sivaramakrishnayya for Respondent.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question in this appeal is whether the charge created by section 5 of the Madras Estates Land Act, 1908, continues to operate in respect of the arrears of rent which

*L.P.A. No. 23 of 1941. 24th March, 1942.

Sri Raja Sobhanadri Apparao Bahadur Garu v. Appanna Sastri.

Leach, C. J.

have accrued due between the date of the landholder's suit and the sale of the property when it has been sold in execution of a decree for rent. Admittedly since the amendment of section 125 of the Act in 1934 the charge does not continue, but this appeal is concerned with a position which arose before the Act was amended and the appellant says that then the charge was a continuing one.

The appellant is a zamindar in the Kistna District. One Gangulu held a patta granted by the appellant, but fell in arrears with his rent. The consequence was that the appellant instituted in the Revenue Court S.S. No. 373 of 1922 to recover what was due to him. He obtained a decree and in execution proceedings (E.P. No. 381 of 1925) he caused 3·56 acres of the holding to be sold. The sale took place on the 5th May, 1926 and the respondent was the purchaser. Although no patta was issued to the respondent he was accepted as the tenant of the 3·56 acres until the year 1934. During these eight years the respondent duly paid to the appellant the stipulated rent. In 1924 the appellant filed another rent suit (No. 287 of 1924) against Gangulu to recover what had become due subsequently by way of rent. He obtained a decree, but apparently he did not take active steps to execute it until 1933. In that year he instituted proceedings in execution and attached all the land covered by the patta, including the 3·56 acres which had been sold to the respondent on the 5th May, 1926. The Court allowed the whole of the holding to be sold, and on the 24th July, 1934, put the appellant into possession of it. It is not surprising that the respondent objected and brought a suit for a declaration that the proceedings were void against him and for a decree for possession of the 3·56 acres and the mesne profits thereon. This suit was filed in the Court of the District Munsiff of Bezwada. The District Munsiff held that it was well founded and granted the respondent the decree which he sought. The appellant appealed to the Subordinate Judge of Bezwada, who reversed the decision of the District Munsiff. The respondent then appealed to this Court and Wadsworth, J., restored the District Munsiff's decree. The present appeal is from the decision of Wadsworth, J., under clause 15 of the Letters Patent.

Before Wadsworth, J., the respondent raised two contentions. In the first place, he said that the execution proceedings were bad because he was in fact a ryot and had received no notice of the execution proceedings, relying here on the Full Bench decisions of this Court in *Lakshmana Aiyar* v. *Aiyasami Chettiar*[1] and *Munisami Mudali* v. *Narasappa Mudali.*[2] In the second place he said that by reason of the sale to him of the 3·56 acres on the 5th May, 1926, the charge referred to in section 5 no longer existed on the land, but had passed to the sale proceeds. The learned Judge considered that it was not necessary to decide the first question as in his opinion the respondent was entitled to succeed on the second point raised by him.

1. (1941) 1 M.L.J. 1: I.L.R. (1941) Mad. 356 (F.B.).
2. (1941) 2 M.L.J. 79: I.L.R. (1941) Mad. 785 (F.B.).

Sri Raja Sobhanadri Apparao Bahadur Garu v. Appanna Sastri.

Leach, C.J.

Section 5 of the Madras Estates Land Act states that the rent of ryoti land together with any interest which may be due in respect of the rent shall be a first charge upon the holding and its produce, subject to a proviso which does not apply here.

S. 125 reads as follows:

> "When a holding or part of a holding is sold for arrears due in respect thereof, the purchaser shall pay, subject to any right or interest which the ryot has created therein with the landholder's permission in writing registered and subject also to any encumbrances created before the passing of this Act, *but not subject to any arrears of rent due in respect of the holding before the date of sale or to interest on such arrears, whether a decree has been obtained or not for such arrears or interest.*"

The words in italics were inserted by the Amending Act VIII of 1934.

Section 127 embodies rules for the disposal of the sale proceeds when a holding has been sold in execution of a decree for arrears of rent. In the first place the Collector is required to make a deduction at a rate not exceeding one anna in the rupee for poundage. The balance is then disposed of this way. The landholder first receives the cost incurred by him in bringing the holding to sale. He is then paid the amount due to him for arrears and interest up to the date of payment. If there remains a balance after these sums have been paid, the landholder is paid any arrears of rent and interest due in respect of the holding between the date of the notice under section 112 and the date of the sale. If when these payments have been made there is still a surplus it has subject to an order of a Civil Court to the contrary, to be paid to the defaulter on his application after the expiration of three months from the date of the sale.

As already indicated, the respondent's case is that when a sale in execution has taken place, the charge created by section 5 is transferred from the land to the sale proceeds. There can be no doubt that this is now the case as the result of the amendment to section 125, but the respondent contends that the amendment of section 125 did not operate to change the law and Wadsworth, J., agreed that this was so. If the conclusion of the learned Judge is right the appellant is out of Court.

There are similar provisions in the Bengal Tenancy Act (VIII of 1885). Section 65 of the Bengal Tenancy Act corresponds to section 5 of the Madras Estates Land Act and section 169 to section 127. The wording is somewhat different, but the provisions are admittedly to the same effect. The question whether the charge on the land is transferred to a charge on the sale proceeds when land is sold in execution of a rent decree under the Bengal Tenancy Act was raised in *Faez Rahaman* v. *Ramsukh Bajpai*,[1] and a Bench of the Calcutta High Court held that the provision in clause (*c*) of section 169 of the Bengal Tenancy Act showed that the Legislature intended that the charge in respect of rent falling due between the date of suit and the date of sale in satisfaction of the decree should be transferred from the tenure to the sale proceeds and that the tenure should pass free of all

1. (1893) I.L.R. 21 Cal. 169.

Sri Raja Sobhanadri Apparao Bahadur Garu v. Appanna Sastri.

Leach, C. J.

liability created upon it by the default of the previous holder. The two acts are in harmony and Wadsworth, J., accepted this decision as correctly interpreting the Madras statute before it was amended and we agree with him. It follows that in our opinion the amendment to section 125 of the Madras Act did not effect any change in the law, and that the words added to the section were only added in order to make it perfectly clear that the charge on the land did not continue. The Court is not concerned with what transpired in the Legislative Council when this amendment was made to the Act. The Court can only have regard to what was in the statute before the amendment and what is in it after the amendment. The District Munsiff did pay attention to what was said in the Legislative Chamber when the amendment was decided on, and in doing so was wrong, but his conclusion that section 125 did not make any change in the law is nevertheless acceptable and the decision of the Calcutta High Court in *Faez Rahaman* v. *Ramsukh Bajpai*[1] lends strong support for this opinion.

As we agree with the decision of Wadsworth, J., the appeal will be dismissed with costs.

B.V.V. ——— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN, SIR CHARLES CLAUSON AND SIR MADHAVAN NAIR.

Navroji Ardeshir Cooper and others .. *Appellants**

v.

Official Assignee, Bombay .. *Respondent.*

P.C.

Navroji Ardeshir Cooper v. Official Assignee, Bombay.

Insolvency—Practice—Application for directions to Official Assignee to lend his name for starting or continuing litigation—Tests for allowing.

A person moving the Court to direct the Official Assignee to lend his name for the purpose of starting or continuing a litigation must satisfy the Court that the Official Assignee in declining to give his name for the purpose notwithstanding that a full and proper indemnity has been offered to him, is not acting as a reasonable man would act if he were owner of, and not merely a trustee of the estate. It is not sufficient for the applicant to point to a possible point which could be raised in argument.

C. S. Rewcastle and *V. K. Krishna Menon* for Appellants.

Sir Thomas Strangman and *E. Holroyd Pearce* for Respondent.

The Judgment of their Lordships was delivered by

Lord Thankerton.

LORD THANKERTON.—The present appeal arises out of a litigation in which the trial Court and the Appellate Division of the High Court have both given judgment on the merits to the same effect. The later stages of the litigation have been conducted at the expense of the present appellants they having indemnified the trustee until after the decision of the High Court. The present appellants then applied to the trustee to carry the case further or, failing that, to allow his name to be used by them, they offering a continued indemnity to the trustee. The trustee de-

1. (1893) I.L.R. 21 Cal. 169.
*P.C. Appeal No. 6 of 1941. 10th February, 1942.

P.C.
—
Navroji Ardeshir Cooper v. Official Assignee, Bombay.
—
Lord Thankerton.

clined, and the result was a notice of motion on 7th January, 1937, on the Insolvency Side of the High Court, asking the Court to direct the Official Assignee to lend his name to the applicants for the purpose of carrying on the appeal to His Majesty in Council, they offering the usual proper indemnity. That motion was heard in the first instance by Blackwell, J., and was refused. The present appellants then appealed to the Appellate Division of the High Court and it was again refused by that Court. It is sufficient to refer to the reasons given by the Chief Justice in the High Court, in which his colleague concurred. He says:

"If we thought that there was any reasonably good prospect of success in the appeal, we might be prepared to grant the leave. But even if we directed the Official Assignee to let his name be used we should then have to be satisfied that there was a substantial point of law before we could grant him leave to go to the Privy Council. In my judgment there is no substantial point of law, so that if we gave the direction asked for in this appeal it would carry the matter no further. The decision of the Court of Appeal against which it is desired to appeal to the Privy Council confirmed the judgment of the lower Court, and both the trial Judge and the Court of Appeal expressed a very emphatic opinion that the plaintiff had no cause of action."

The present appeal is against that judgment of 9th March, 1938. Three main points were mentioned by Mr. Rewcastle in his very full and able address to their Lordships, but he quite frankly admitted that if, in regard to any one of those three points he had not made out what it was necessary for him to make out for the purpose of succeeding in this appeal, he would fail. It is sufficient to deal with the first point namely the question whether there was a partnership between the insolvent and Narandas. On this point the appellants have the judgments of two Courts against them. Their Lordships have listened to the grounds as stated by counsel for the appellants on which he founds his hope of persuading their Lordships that they ought to overrule those judgments. The High Court have expressed a strong view on the complete insufficiency of those grounds and their Lordships are satisfied that that view is a correct one. This conclusion must necessarily result in the failure of the present appeal. It is to be borne in mind that if this appeal succeeded, the next step would be an application to the High Court for leave to appeal. The judgment already given in the High Court makes it clear that that application would fail. The next step would be an application to His Majesty in Council for special leave to appeal. In view of what their Lordships have just stated, their Lordships would be bound to advise His Majesty to refuse special leave. It follows that to allow the present appeal would in no whit benefit the appellants and would merely lead to expenditure of money in costs.

Their Lordships desire to add that they entertain no doubt as to the principles on which the Court should deal with such a motion as that which is the subject of the present appeal. Such a motion seeks to get the Court to overrule the decision of the Official Assignee not to litigate further. It is not sufficient for the applicant to point to a possible point which could be raised in argument. He must satisfy the Court that the Official Assignee,

in declining to give his name for the purpose of starting or continuing a litigation, notwithstanding that a full and proper indemnity has been offered to him, is not acting as a reasonable man would act if he were owner of, and not merely a trustee of the estate. Their Lordships accordingly will humbly advise His Majesty that the present appeal should be dismissed. The appellants will pay the costs of the respondent.

P.C.

Navroji Ardeshir Cooper *v.* Official Assignee, Bombay.

Lord Thankerton.

Solicitors for Appellants: *Stanley Johnson & Allen.*

Solicitors for Respondent: *Hill, Dickinson & Co.*

K.S. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AYYAR.

Kuppuswami Naidu .. *Petitioner**

v.

Varadappa Naidu and others .. *Respondents.*

Kuppuswami Naidu *v.* Varadappa Naidu.

Civil Procedure Code (V of 1908), *Order* 33, *rules* 2 *and* 5 (a)—*Petitioner in* forma pauperis *not making a full disclosure of his assets and properties —Legality of.*

It is the bounden duty of a petitioner in *forma fauperis* under Order 33, rule 2 read with rule 5 (*a*) of the Civil Procedure Code to make a full and accurate verified statement about his properties.

Durga Prasad v. *Srinivasa,* A.I.R. 1930 Pat. 368, explained.

Where there was fraudulent suppression the fact that even if the particular asset that had come to light had been disclosed it would not have affected the question of the alleged pauperism of the applicant has no relevance inasmuch as any intentional departure from good faith, whatever the motive might be must lead to a dismissal of the petition.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Vellore, dated 20th March, 1941 and made in O.P. No. 58 of 1940.

Ch. Raghava Rao for Petitioner.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—All that can be said for the petitioner at best is that the order of the lower Court is wrong. But this by itself will not justify interference in revision under section 115 of the Code. It was not a case of unintentional or accidental omission of assets. The Judge finds that it was a fraudulent suppression. The argument that, even if the particular asset that has now come to light had been disclosed, it would not affect the question of the alleged pauperism of the applicant does not take stock of the fact that the utmost *bona fides* is required of the petitioner in the matter of the disclosure of his or her assets and that any intentional departure from good faith, whatever the motive might be, must attract the consequence of a dismissal of the petition, because under Order 33, rule 2 read with Order 33, rule 5 (*a*) it is the bounden duty of the petitioner to make a full and accurate verified statement about his properties. *Mt. Chamela Kuar* v. *Pursottam Das*[1]

*C.R.P. No. 1752 of 1941. 24th June, 1942.

1. A.I.R. 1932 Pat. 308.

Kuppuswami Naidu v. Varadappa Naidu.

was relied on for the petitioner, but there the omission was held to be not an act of bad faith, and related to trifling movable properties—a couple of trunks and an almyrah. The earlier case in *Durga Prasad* v. *Srinivasa*[1] was sought to be distinguished on the ground that the assets suppressed were of value and that their inclusion would have led to the dismissal of the petition. This distinction however is not sound on the facts because even in that case there was the explanation of the pauper that the value of the equity of redemption in certain properties was worthless and that his interest in certain other properties was similarly of no value. The learned Judges proceed on the footing that, even if such were the case, it was his duty to have made a full disclosure, and this is pointed out in more than one place in the course of the judgment of the learned Chief Justice.

This petition is dismissed with costs.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

A. Krishnaswami Vandayar .. *Appellant** (*2nd Deft.*)

v.

The Union Bank, Ltd., Kumbakonam .. *Respondent* (*Plff.*).

Krishnaswami Vandayar v. Union Bank, Ltd., Kumbakonam.

Madras Agriculturists' Relief Act (IV of 1938), *section* 10 (2) (iii)—*Meaning of "interest payable in respect of the liability is not more than nine per cent. per annum."*

The words "interest payable in respect of the liability is not more than nine per cent. per annum" in section 10 (2) (*iii*) of Madras Act IV of 1938 which excludes from the purview of sections 8 and 9 of the Act any liability in respect of any sum due to a public or a scheduled bank if the interest payable is not more than nine per cent. per annum cannot be read as meaning "not more than nine per cent. per annum, *simple interest.*"

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, dated 22nd November, 1940 and passed in O.S. No. 8 of 1940.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

S. Ramachandra Aiyar for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This appeal raises a question relating to the effect of section 10 (2) (*iii*) of Madras Act IV of 1938 which excludes from the purview of sections 8 and 9 of the Act any liability in respect of any sum due to a public company or a scheduled bank, if the interest payable in respect of the liability is not more than nine per cent. per annum.

The facts of the present case so far as they are necessary are that the appellant borrowed from the plaintiff-bank by way of a standing overdraft, secured by the execution of promissory notes.

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1. A.I.R. 1930 Pat. 368.

*Appeal No. 74 of 1941. 1st July, 1942.

Krishnaswami Vandayar *v.* Union Bank, Ltd., Kumbakonam.

Wadsworth, J.

It is common ground that the arrangement was that the appellant should pay interest at the current rate charged by the bank. The rate at the inception of the dealings was nine per cent. It never exceeded nine per cent. and in later years it fell to seven per cent. The understanding was that every half year the interest should be calculated and in accordance with the practice followed in bank accounts it was treated as having been paid and advanced to the debtor. This arrangement was embodied in a pass-book which passed between the debtor and the bank. There was no express stipulation for the payment of compound interest. But it is argued, firstly, that the arrangement between the parties amounts to a contract for borrowing at nine per cent. compound interest, secondly that the words "not more than nine per cent. per annum" in section 10 (2) (*iii*) of the Act mean "not more than nine per cent. per annum simple." Reliance has been placed upon a decision of King, J., in *Srinivasachariar* v. *Conjeevaram Hodgsonpet Dharmarakshaka Nidhi, Ltd.*[1] The report of that case does not make it clear whether or not the default rate stipulated in the contract added on to the simple rate in the contract would amount to more than nine per cent. But the learned Judge seems to have estimated the rate of interest with reference to the total amount due at the time of the suit, a procedure regarding the soundness of which we are with great respect, not convinced. However, we doubt very much whether, when a client of a bank borrows under a standing overdraft, agreeing to pay the current rate of interest and the bank, following the usual procedure in calculating interest periodically, treats the interest as paid and the amount due for this interest as an addition to the overdraft, such a contract can properly be described as a contract for borrowing at compound interest. But, assuming for the moment that it can be so regarded, we do not think that the words "interest payable in respect of the liability is not more than nine per cent. per annum" should be taken as meaning not more than "nine per cent. per annum simple interest". It is to be noted that where the Legislature in this statute intended to indicate simple interest, the words "simple interest" are found and where the word "interest" is found without any qualification, it is in other sections of the Act clearly intended to cover both simple and compound interest. Thus in section 8, when we find that all interest outstanding on 1st October, 1937, is to be cancelled, clearly the term means interest simple or compound. So also in the later clauses of that section. In section 9 when it is provided that interest shall be calculated at "five per cent. per annum simple interest, credit being given to all sums paid towards interest", the last word must clearly cover interest simple or compound and the earlier phrase is clearly confined to simple interest. Similarly in section 12 the rate at which interest is to be scaled down is expressly defined in terms of simple interest and so also in section 13. In section 10, however, the liabilities of banks are excluded from the purview of the Act if the interest payable is not more than nine per cent.

1. (1940) 2 M.L.J. 478.

Krishnaswami Vandayar v. Union Bank, Ltd., Kumbakonam. — Wadsworth, J.

per annum. Presumably the Legislature must have been aware that interest charged by banks on overdraft accounts is normally treated in the manner in which the present account has been treated. It would to our mind be an anomaly to assume that the Legislature intended by this phrase to exclude interest charged in the ordinary way in which a bank ordinarily charges it.

In the result, therefore, we see no reason to interfere with the lower Court's decision and dismiss the appeal with costs.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Manal Krishna Nayak and Sons, by partners, M. Venkataraya Nayak and others .. *Appellants** (*Defts.*)

v.

The South Indian Railway Company, Limited, by its Agent at Trichinopoly .. *Respondent.* (*Plff.*).

Manal Krishna Nayak and Sons. v. South Indian Railway Co., Ltd.

Railways Act (IX of 1890), section 55—Freight charges—Deficiency caused owing to mistake—Delivery of goods consigned—Suit by Railway Company against consignor for undercharges—Maintainability.

Where a Railway Company which had by some mistake collected low freight charges on certain consignments of goods instituted a suit against the consignor, after all the goods were delivered over to the consignees, for recovery of the deficiency in the amount of freight that was chargeable,

Held, that the suit was maintainable as the remedy by way of suit for recovery of undercharges was provided for in section 55 of the Railways Act.

Appeal against the decree of the District Court of South Kanara in A.S. No. 254 of 1936 preferred against the decree of the Court of the District Munsiff of Mangalore in O.S. No. 383 of 1934.

K. Y. Adiga and *K. P. Adiga* for Appellants.

S. S. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The South Indian Railway Company filed the suit out of which this second appeal arises for recovery of a sum of Rs. 1,243-7-6 as freight due to it and which is alleged to have been the undercharge in respect of some consignments by the appellant-defendant from Mangalore to Bombay. Three consignments of gold were booked on 16th September, 1933, 23rd September, 1933 and 9th October, 1933, from Mangalore to Bombay and the case of the railway company is that while these consignments were liable to be charged at specially high rates, by some mistake low freight charges had been collected and that therefore the company is entitled to recover the deficiency.

Various defences were raised, but there is only one question which can legitimately be urged in second appeal and that is, whether the railway company has got the right of filing a suit after all the goods were delivered over to the consignees. The contracts in question which are the forwarding notes are

*S.A. No. 96 of 1939. 12th August, 1941.

Manal Krishna Nayak and Sons. v. South Indian Railway Co., Ltd.

Exs. A, B and C. In all these documents there is clause 8 which runs as follows:—

"Goods booked to stations on the South Indian Railway, or railways worked by the South Indian Railway are carried subject to the rules and conditions printed from time to time in the railway company's goods tariff; and goods booked to or over a foreign railway are subject to the rules and regulations of wharfage and other charges in force on such railway."

Here the goods were consigned from Mangalore which is a station on the South Indian Railway to Bombay which is a station over a foreign railway, namely, the G. I. P. Railway. In such a case under clause 8 of Exs. A, B and C the goods are booked subject to the rules and regulations in force over the G.I.P. Railway. Ex G. is admittedly a copy of the rules in force over the G.I.P. Railway and over other railways as well. Clause 23 of Ex. G runs thus:

"Right to correct charges: Railways reserve the right to correct any charges that may have been incorrectly made and to recover undercharges from whatever causes arising".

Ex. G is headed "The Indian Railways Coaching Tariff." It is admitted that the particular consignments are governed by the rules contained in this document, Ex. G. The right to recover undercharges by way of a suit is given by section 55, clause 5 of the Indian Railways Act which runs thus:

"Notwithstanding anything in the foregoing sub-sections the Railway administration may recover by suit any such rate, terminal or other charge as aforesaid or balance thereof."

Under clause 1 which is one of the sub-clauses referred to,

"if a person fails to pay on demand made by or on behalf of a railway administration any rate, terminal or other charge due from him in respect of any animals or goods, the railway administration may detain the whole or any of the animals or goods or, if they have been removed from the railway, any other animals or goods of such person then being in or thereafter coming into its possession."

So there are two rights which are given under section 55, clause 1. If some goods are consigned, those very goods may be detained before delivery unless the amount which is demanded is paid. The second is that even if those goods were delivered over, if any other goods of the consignor come into the possession of the railway company, then the company has got the right of lien over such goods as well. Then clause 5 of the same section says:

"may recover by suit any such rate, terminal or other charges as aforesaid."

The railway administration may recover by suit the sums for which they can detain goods under clause 1. Here the railway authorities are entitled under the Act and under clause 23 of Ex. G to correct any charges that may have been made incorrectly, and they have got the right to recover the undercharges from whatever cause arising. Recovery may be made either by exercising the lien over the particular goods in respect of which this undercharge was made or by exercising the lien over any other goods of the consignor which may subsequently come into the possession of the railway company, or by way of a suit. All these three modes of recovery are open to the railway company. In this case the railway company exercised the right of suit after the goods were all delivered. I do not see how it can be said

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that the railway administration is confined to the first two remedies as the learned counsel for the appellant would have it. Mr. Adiga concedes that before the goods were removed from the terminal station the amount in question might have been recovered by exercising the lien which the railway company has. But what he says is that the third remedy by way of suit is not available. If all these three remedies are given by section 55, two by clause 1 and the third by clause 5, it is difficult to see how the railway administration can be confined to the remedies given under clause 1, particularly when clause 5 says:

"Notwithstanding anything in the foregoing sub-sections, the railway administration may recover by suit any such rate, terminal or other charge as aforesaid or balance thereof."

I therefore confirm the decree of the lower appellate Court and dismiss the second appeal with costs.

Leave to appeal is granted.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN, AND MR. JUSTICE SOMAYYA.

Karunalaya Valangupuli Pandian *alias* Karunalaya Pandian .. *Petitioner** (*Plff.-Applt.*)

v.

Rev. Father Pignot, Father Superior of the Roman Catholic Mission (Rev. Father G. Forean, S.J., the present acting Father Superior of the Roman Catholic Mission, Palamcottah, brought in the place of Rev. Father Pignot formerly representing the Mission) .. *Respondent* (*Deft.-1st Respt.*).

Karunalaya Valangupuli Pandian v Rev. Father Pignot.

Civil Procedure Code (V of 1908), section 110 (c)—Meaning of "decree" used in connection with the High Court—High Court agreeing with lower Court in rejecting prayer for possession and directing payment of certain amount on foot of concession—Decree one of affirmance.

A suit on behalf of a trust for recovery of possession of certain properties was dismissed by the trial Court and on appeal the High Court also rejected the prayer and directed the defendant to pay a sum of Rs. 12,100 into Court for the benefit of the trust as a matter of concession by the defendant and not as a decision of Court, and gave certain directions regarding that sum. On an application for leave to appeal to the Privy Council,

Held: The term 'decree' used in connection with the High Court in section 110 of the Civil Procedure Code may comprise several decisions and each decision may relate to a distinct matter; and since the decree of the High Court as regards possession was one affirming the decision of the lower Court and as regards the sum directed to be paid did not form the subject-matter of the proposed appeal, being fully satisfied, the decree was one of affirmance of the decree of the lower Court and leave to appeal cannot be granted.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioner herein to appeal to His Majesty in Council against the decree in A.S. No. 32 of 1938 preferred to the High Court against the decree of the Court of the Subordinate

*C.M.P. No. 1446 of 1942 in Appeal No. 32 of 1938. 24th July, 1942.

Judge of Tinnevelly, dated 28th January, 1937 and made in O. S. No. 58 of 1934.

Karunalaya Valangupuli Pandian *v.* Rev. Father Pignot.

C. Narasimhachariar for Petitioner.

K. V. Krishnaswami Aiyar, P. N. Appuswami Aiyar and *T. L. Venkatarama Iyer* for Respondent.

The Order of the Court was delivered by

Somayya, J.

Somayya, J.—This petition is filed by the plaintiff for leave to appeal to His Majesty in Council against the judgment and decree of this Court in A.S. No. 32 of 1938. It is opposed by the respondent who was the first defendant on the ground that the decree of this Court confirmed the decision of the lower Court and that there is no substantial question of law so as to justify the grant of leave under the last paragraph of section 110, Civil Procedure Code. The properties are admittedly worth over Rs. 10,000, and the only question is whether the other conditions of section 110 are satisfied.

The facts that are necessary for the disposal of this application are these. The petitioner filed the suit for recovery of possession of the suit properties as the trustee of an endowment for certain services in Sri Papavinasa Swami Temple at Vikramasingapuram, Tinnevelly district. The properties in suit were admittedly the inams originally endowed for the performance of this trust. But, during the lifetime of the petitioner's grandfather, the properties were sold in execution of a money decree against him, purchased by one Hem Singh and transferred thereafter to Ramachandra Nachiar the grandmother of the petitioner. She then created an usufructuary mortgage of the first item of the suit properties to a third party and during the subsistence of that mortgage, she died leaving a will bequeathing the properties to the petitioner's father who was then a minor and appointed some persons to act as his guardians during his minority. The guardians sold the first item to the respondent, which forms the major portion of the suit properties. The petitioner's father died in the year 1931 and the present suit was filed on the 24th September, 1934 claiming recovery of possession of the suit properties from the various defendants.. The suit was dismissed by the trial Court and there was an appeal to this Court. There were a number of respondents in the appeal, but the appeal was pressed only as regards item 1 against the first respondent in the appeal and he is the sole respondent in this application. The defences are that the suit is barred by limitation, that the properties were all resumed by the Government and granted to the respondent on the 3rd June, 1907 on ryotwari tenure and that the resumption freed the properties from the burden of service. It might be mentioned that the sale to the respondent was subject to a condition that a sum of Rs. 300 should be paid every year for the performance of the suit trust. After the resumption and the grant of the lands on ryotwari tenure even this sum was not paid as the lands were no longer trust properties.

In this Court it was contended that the suit was filed within 12 years from the death of the petitioner's father in 1923, that as the lands were alienated on his behalf limitation began to run

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only from the date of his death and that, therefore, the suit was within time. Following two earlier decisions of two Division Benches of this Court in *Venkatasubramania* v. *Sivagurunatha,*[1] a decision of Ramesam and Stone, JJ. and *Alam Khan Sahib* v. *Karuppannaswami Nadan,*[2] a decision of Venkatasubba Rao and Abdur Rahman, JJ., this Court held that where the alienation was not by the manager as such but in his individual capacity as the absolute owner of the property, limitation began to run from the date of the alienation itself and that, therefore, the suit was barred by limitation. It was also held that the resumption by the Government and the subsequent grant of the lands on ryotwari tenure to the respondent who was not the trustee put an end to the character of the properties as trust properties and conferred an absolute right on the grantee. As regards the undertaking in the sale-deed of 1893 to pay a sum of Rs. 300 per year for the performance of the trust, an argument was advanced that at least that sum was payable by the respondent. It was urged in reply that even this claim could not be enforced after the resumption and the grant on ryotwari tenure but the learned counsel for the respondent offered that he would get his client to pay into Court a sum which would fetch Rs. 300 per year for the benefit of the trust. This was as a matter of concession and it is not a decision of this Court. This Court, therefore directed the respondent to pay a sum of Rs. 12,100 into Court and gave certain directions regarding that sum.

In seeking permission to carry this matter on appeal to His Majesty in Council, the petitioner urges that the decree of this Court did not affirm the decision of the lower Court and that, therefore, he is entitled to the leave asked for. Next he urges that the decree of this Court involves substantial questions of law.

On the first question, it is said that as the decree of this Court directed the respondent to pay a sum of Rs. 12,100 into Court, it did not affirm the decision of the lower Court. Any variation in the decree, it is said, is enough to take it out of the last paragraph of section 110, Civil Procedure Code. On this question, one of us sitting with Venkatasubba Rao, J., decided that the term "decree" used in connection with the High Court and the expression "decision" used in regard to the lower Court in section 110, Civil Procedure Code did not mean exactly the same thing, that a single decree may comprise several decisions and that each decision may relate to a distinct matter and the prior decisions on the question were dealt with—see *Velayya* v. *President, H. R. E. Board, Madras.*[3] Applying it to the facts of this case, as regards the claim for recovery of possession, the decree of this Court affirms the decision of the lower Court.

As regards the claim for Rs. 300, it is a distinct matter and with regard to that matter the petitioner's claim was fully satis-

1. A.I.R. 1938 Mad. 60.
2. (1938) 1 M.L.J. 113.
3. (1938) 1 M.L.J. 487.

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fied and that is not the subject-matter of the proposed appeal to His Majesty in Council. As regards the subject-matter of the appeal to His Majesty in Council, the decree of this Court is one of affirmance of the decision of the lower Court and hence following the above decision, we must decline to accept the contention that the decree is not one of affirmance of the decision of the lower Court.

As regards the next question, it is true that when the alienor does not profess to convey trust property as manager but does so in his professed capacity as an absolute owner, the question whether time would begin to run from the date of the alienation or only from the death of the alienor is a substantial question of law. But as the respondent's counsel urges, the decision of this Court is also based on the finding that the resumption by the Government on the ground that the bulk of the endowment was diverted to purposes not covered by the original grant, and a fresh grant to the respondent who was not the trustee put an end to the character of the suit property as trust property and that this decision does not involve a substantial question of law being a well-established proposition of law. On this question the decisions are uniform in holding that where some properties were granted for the performance of certain services and the properties are alienated or diverted to purposes not covered by the original grant, the Government can resume the lands and grant them to any one and that the resumption puts an end to the character of the trust. Reliance was placed by the petitioner's advocate on the decision of this Court in *Mohamed Esuf Sahib* v. *Moulvi Abdul Sathur Sahib*.[1] But that was a case where the original trustee himself happened to be the grantee and section 88 of the Trusts Act was invoked and it was held that the trustee cannot take advantage of his own wrong and that the trust fastens itself to the property in his hands. The same decision recognises that where the grantee is not the trustee the position would be different. On page 178 of the report we find:

"If the Government had granted the lands to a stranger without expressly providing for the trust to attach to them, it may be that they would have become the ordinary private ryotwari property of the grantee."

Resumption, as is pointed out in *Punniah* v. *Kotamma*[2] is not merely giving up the reversionary interest of the Government, but it is a case of the tenure itself being put an end to. Reference may also be made to the decision of the Judicial Committee in the case of *Venkata Jagannadha* v. *Veerabhadrayya*,[3] where the difference between the enfranchisement of a personal inam and the resumption of a service inam is pointed out. The decision of this Court on the question of resumption and fresh grant would render it unnecessary to go into the other question whether the suit was barred by limitation. We, therefore, dismiss this application with costs.

K.C. —— *Petition dismissed.*

1. (1918) 36 M.L.J. 262: I.L.R. 42 Mad. 161.
2. (1916) I.L.R. 40 Mad. 939.
3. (1921) 41 M.L.J. 1: L.R. 48 I.A. 244: I.L.R. 44 Mad. 643 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Tentu Appalaswamy .. *Petitioner** (*Accused*).

Appalaswamy *In re.*

Defence of India Rules (1939)—*Mere possession of literature containing seditious views—Heavy sentence—Liability for.*

Possession *simpliciter* of seditious literature or manuscripts is liable to draw a heavy sentence under the Defence of India Rules. Where the manuscript found in the accused's possession indicated that the literature was intended to be disseminated the fact that the accused did not own the literature is no ground for reducing the sentence.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session, West Godavari Division at Ellore, dated 27th January, 1942 and made in C.A. No. 7 of 1942, preferred against the judgment of the Court of the Sub-Divisional Magistrate, Ellore, in C. C. No. 108 of 1941.

M. Appa Rao for Petitioner.

N. Somasundaram for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—This revision case was admitted because neither the trial Magistrate nor the Sessions Judge in appeal indicated in any way the nature of the documents that were the subject of the charge and it was therefore impossible to judge whether the sentence imposed was reasonable or otherwise.

After going through the various exhibits it is clear that the literature found in the possession of the petitioner was of a particularly virulent nature, especially Ex. C-1. It is argued that as only mere possession has been proved and there was no indication that the petitioner owned that literature or disseminated seditious views, the sentence is excessive. Possession *simpliciter* is however liable to a heavy sentence under the Defence of India Rules and the manuscript Ex. D indicates that the literature found was intended to be disseminated. The sentence which has been considered reasonable by the two Courts below cannot therefore, in any view of the matter, be deemed to be excessive. I find no cause for interference.

I have been asked to take into account the changed attitude of the communist party, of which the petitioner was a member, towards the Government and the Government's attitude to the communist party. That seems to me, however, a matter for the consideration of the executive rather than of the Court.

The petition is dismissed.

K.S. ——— *Petition dismissed.*

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*Crl. R. C. No. 258 of 1942 (Crl. R. P. No. 244 of 1942). 1st July, 1942.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Vydialinga Swamigal .. *Appellant** (*Petitioner*)

v.

Karuppanna Goundan and others .. *Respondents* (*Respts.*).

Vydialinga Swamigal *v.* Karuppanna Goundan.

Civil Procedure Code (V of 1908), order 21, rule 95—Petition for delivery of possession of some items of property purchased in execution—Purchaser apprehending obstruction as to one item endorsing on warrant that he would take possession of that item later with police help—Court recording it and dismissing petition—Subsequent petition three years after confirmation of sale of other items—Continuation of earlier application and not barred.

A purchaser of some properties in execution of a decree filed a petition under Order 21, rule 95 of the Civil Procedure Code for delivery of possession of the same. All the items except one were delivered and as the purchaser apprehended obstruction by the defendant with regard to the one item, he endorsed on the warrant that he would take possession later on with police help. This was recorded by the Court on 21st September, 1936 and the petition was dismissed. A petition was filed by the purchaser on 26th August, 1939 three years after the date of the confirmation of the sale.

Held: It was the duty of the Court to have posted the first petition to some other date to enable the petitioner to get the necessary police help. Since this was not a case in which the party was at fault, the dismissal of the petition must be considered to be an order adjourning the petition *sine die* till the petitioner takes steps. The second petition must be considered to be a continuation or remainder of the previous application for the purposes of limitation.

Decision of Burn, J., in C.M.A. No. 520 of 1940, followed.

Appeal against the order of the District Court of Coimbatore, dated 13th March, 1940 and made in A.S. No. 80 of 1940 preferred against the order of the Court of the District Munsiff of Erode, dated 20th December, 1939 and made in C.M.P. No. 1560 of 1939 in E.P. No. 470 of 1934 in O.S. No. 24 of 1933.

M. Krishna Bharathi for Appellant.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The appellant had purchased some properties in execution of a decree and he filed a petition under Order 21, rule 95, Civil Procedure Code, for delivery of possession of the same. There were a number of items and all of them except one item S. No. 187-A of Punjai Lakkapuram village were delivered. With regard to this item delivery was not given as the purchaser apprehended that the defendant was likely to obstruct and he endorsed on the warrant that he would take possession later on with police help. This was recorded by the Court on 21st September, 1936 and the petition was dismissed. This petition out of which this second appeal arises was filed on 26th August, 1939 three years after the date of the confirmation of the sale. The petitioner (*i.e.*, the present appellant) stated that this petition must be considered to be a continuation of the prior petition referred to above and that therefore it was in time. Both the Courts found against him and dismissed the petition. This was

*A.A.A.O. No. 47 of 1941. 3rd July, 1942.

Vydialinga Swamigal *v.* Karuppanna Goundan.

not a case in which there was any default on the part of the auction-purchaser. From the order passed on E.A. No. 1081 of 1936 it is clear that as the purchaser apprehended obstruction from the defendant, he wanted time to take possession with necessary police help. It was the duty of the Court to have posted the petition to some other date to enable the petitioner to get the necessary police help. Instead, the petition was dismissed recording the delivery of the other items. Since this was not a case in which the party was at fault, the dismissal of the petition must be considered to be an order adjourning the petition *sine die* till the petitioner takes steps. In C.M.A. No. 520 of 1940, His Lordship Justice Burn held in a very nearly similar case that the later petition must be considered to be a continuation or remainder of a previous application for the purposes of limitation.

In the result, the decrees of the Courts below are set aside and the petition is remanded to the original Court for being proceeded with on the basis that the petition is only a continuation of the previous application. The respondents will pay the appellant's costs in this and in the lower Courts.

Leave refused.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

P. Subbamma .. *Petitioner** (*Petitioner*)

v.

Ch. Venkata Reddy .. *Respondent* (*Respondent*).

Subbamma *v.* Venkata Reddy.

Civil Procedure Code (V of 1908), section 107 and Order 9, rule 9—Civil revision petition in High Court—Dismissal for default—Power to restore.

A civil revision petition which is dismissed by the High Court for default of appearance cannot be restored, as the provisions of Order 9, rule 9 read with section 107 of the Civil Procedure Code do not apply to such a case. There is no difference in principle between a revision petition under section 115 of the Civil Procedure Code and one under section 25 of the Provincial Small Cause Courts Act, in this respect.

Decision of Burn, J., in *Khizar Muhammad* v. *Abdul Razack Sahib*, C.M.P. No. 6550 of 1941, (1941) 2 M.L.J. (N.R.C.), 88, followed.

Petition praying that the High Court will be pleased to restore C.R.P. No. 968 of 1941 on the file of the High Court to file and dispose of the same on the merits.

Ch. Raghava Rao and *G. C. Venkatasubba Rao* for Petitioner.

A. S. Nataraja Aiyar for Respondent.

The Court made the following

ORDER.—This petition seeks the restoration of C.R.P. No. 968 of 1941, which was dismissed on 20th March, 1942, for default of appearance. The facts, which are very much in the petitioner's favour, were that the time of sitting was altered from 2 P.M. to 12 noon at somewhat short notice and there was consequently some confusion. Although the petitioner's application is not without merit, the respondent's learned advocate contends

*C.M.P. No. 1757 of 1942 10th April, 1942.

that the petition is not maintainable and he relies on the decision of Burn, J., in the case of *Khizar Muhammad* v. *Abdul Razack Sahib*, C. M. P. No. 6550 of 1941.[1] In that case the restoration of a civil revision petition under section 115 of the Civil Procedure Code was sought under section 107 read with Order 9, rule 9 of the Civil Procedure Code. It was held that neither of these provisions applied and the application was dismissed. The petitioner's learned advocate contends that inasmuch as the revision petition now in question is one filed under section 25 of the Provincial Small Cause Courts Act there is a distinction to be drawn, but I can see no difference in principle between a revision petition under section 115 of the Civil Procedure Code and one under section 25 of the Provincial Small Cause Courts Act so far as the question of maintainability is concerned. In the result, the petition is ordered to be dismissed but without any order as to costs as the respondent's learned advocate is prepared to forego them. Subbamma v. Venkata Reddy.

B.V.V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Thammana Ramalingayya .. *Petitioner* (Accused).*

Defence of India Rules (1939), *rule* 19 (1) (a) *and* (5)—*Sending, by post to a destination outside British India a letter containing a Code for secretly conveying information—Interception of letter by censor—If makes it 'not sent'—Secret Code—Tests—Criminal trial—Sentence—Imprisonment till rising of Court—Propriety.* Ramalingayya, In re.

In a prosecution for an offence punishable under rule 19 (1) (a) and (5) of the Defence of India Rules of sending by post to a destination outside British India a "Code" for being used as a means of secretly conveying information it was contended *inter alia* that as the letter was intercepted by the censor the letter could not be deemed to be sent.

Held: An article "is sent", if it is started on its way to its destination. The fact that it did not arrive at its destination cannot alter the fact that it was sent.

A "Code" does not cease to be a secret Code, because a number of other persons are using it, if it is not generally known or used by persons engaged in the business for which the Code in question is employed.

Even in cases where the alternative of fine is not permissible by law, it is objectionable to sentence persons to imprisonment till the rising of the Court, because it is not a form of imprisonment recognised by law, and it is used to circumvent the provisions of law that require a sentence of imprisonment in jail for a particular term. Where the law permits of a sentence of fine as an alternative, there is no need for a sentence of imprisonment at all if it is thought that the offence does not merit it.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session, East Godavari Division at Rajahmundry, dated 27th November, 1941 and passed in Criminal Appeal No. 93 of 1941 (C. C. No. 97 of 1941, Joint Magistrate's Court, Rajahmundry).

K. Umamaheswaram for Petitioner.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

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1. (1941) 2 M.L.J. (N.R.C.), 88.

*Crl.R.C. No. 214 of 1942 (Crl.R.P. No. 201 of 1942). 10th July, 1942.

Rama-
lingayya,
In re.

The Court made the following

ORDER.—The petitioner was convicted by the Joint Magistrate of Rajahmundry of an offence punishable under rule 19 (1) (*a*) and (5) of the Defence of India Rules of sending by post to a destination outside British India (to wit the United States of America) instructions for utilising any means of secretly conveying information (namely a Code).

Two points are raised in this petition. The first is that as the letter was intercepted by the Censor at Bombay (or Madras) the letter was not sent. The second contention is that this Code is not a secret one.

I think it correct to say that an article is sent if it is started on its way to its destination. For instance, if *A* gives a book to a messenger with instructions to give it to *B* I think it will be correct to say that *A* sent the book to *B* even though that messenger was waylaid and the book taken from him. One can say that the book was sent, but that it did not arrive at its destination. Any other interpretation would make rule 19 almost nugatory; for there would ordinarily be no detection when the missive reached its destination.

The Code used by the petitioner is called Monte Amiata's Telegraphic Code. It is issued by a company registered in Rome known as Monte Amiata S. A. M. Just inside on the fly leaf of the Code-book is printed

"This Code is for private use. and not for public sale, but only for distribution amongst the correspondents of the 'Monte Amiata S.A.M.' for use in Commercial intercourse with the quicksilver and cinnabar trades, to which it exclusively refers."

The petitioner was not a client of Monte Amiata S.A.M., nor was his correspondence in any way connected with the quicksilver and cinnabar trades. If it had been, he might have contended with some reason that this Code was a well-known and recognised Code; but it is certainly not a Code in ordinary use for the business for which the petitioner says he used it. A Code does not cease to be a secret Code because a number of other persons are using it, if it is not generally known or used by persons engaged in the business for which that Code in question is employed.

I therefore agree with the Courts below that the petitioner was guilty of the offence with which he is charged. The sentences in this case are ridiculous. For such an offence, an accused person can be punished with imprisonment for a term extending to 3 years or with fine or with both. If the Joint Magistrate or the Sessions Judge thought that it was unnecessary or undesirable to punish the petitioner with imprisonment, there was no necessity to sentence him to imprisonment till the rising of the Court. Even in cases where the alternative of fine is not permissible by law, it is objectionable to sentence persons to imprisonment till the rising of the Court; because it is not a form of imprisonment recognised by law, and it is used to circumvent the provisions of law that require a sentence of imprisonment in jail for a particular term. Where the law permits of a sentence of fine as an alternative, there is no need for a sentence of imprisonment at all if it is thought that the offence does not merit it.

As to the quantum of fine, it may be true, as the learned Sessions Judge seems to think, that the petitioner is entirely innocent of any intention to injure the state during the present emergency; but I do not think it right on that account to impose no punishment at all—which is what the learned Sessions Judge has done. It must be almost impossible in the majority of cases under this rule to be sure of the accused's innocent motive. Communications with persons outside India even when they were intended to prejudice the state, would probably not contain in any one letter anything that was obviously injurious. In the first instance, some simple instructions such as the petitioner sent in the present case would be sent. Further instructions issued from time to time by similar letters, each apparently harmless in itself, might only reveal their true nature when read with the other letters of the series.

I therefore change the sentence of the petitioner from imprisonment till the rising of the Court to a fine of Rs. 25.

K.S. ——— *Sentence varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Sri Raja Vyricherla Narayana Gajapati Raju Bahadur Varu .. *Appellant** (*Ctr.-Petnr.*)

v.

Takuru Narasimhulu .. *Respondent* (*Petitioner*).

Madras Agriculturists' Relief Act (*IV of* 1938), *sections* 8, 15, 16 *and* 19—*Decree for arrears of rent and land cess—Land becoming estate under Madras Estates Land Act as amended in* 1936—*Application for scaling down decree as for a debt—Maintainability.*

The appellant obtained a decree on the 18th March, 1936, for rent or damages for use and occupation, the period covered by the arrears being from the 15th December, 1932 to 15th October, 1935. He also got a decree for land cess in respect of the same lands for the period from the 30th June, 1931 to 30th June, 1935. After Act IV of 1938 came into force the judgment-debtor filed an application under sections 8, 15 and 19 of that Act to scale down the debt due under the decree. He did not make any deposit of rent for faslis 1346 and 1347 as contemplated in section 15 and the District Munsiff dismissed the petition for want of such deposit. In appeal the Subordinate Judge held that the rent which was decreed was not rent as defined by Act IV of 1938 and that the decree could be scaled down as a decree for a debt. The land for which the rent had been due became an estate under the Madras Estates Land Act as amended in 1936.

Held, that the effect of the amendment of 1936 to the Madras Estates Land Act was not to change the character of the rent or the relations of the parties as they stood at the time of the previous adjudication, and that the decree was rightly allowed to be scaled down as a decree for a debt.

Kondappa Naidu v. *Mahalakshmamma*, (1938) 1 M.L.J. 206, considered.

Held, further, that the decree for land cess and for costs could also be scaled down in accordance with the provisions of the Act.

Appeal against the order of the Court of the Subordinate Judge of Chicacole, dated 26th August, 1940, and made in A.S. No. 271 of 1939 preferred against the order of the Court of the

*A.A.O. No. 565 of 1940. 10th February, 1942.

Narayana Gajapati Raju v. Narasimhulu. — Wadsworth J.

District Munsiff of Rajam, dated 1st November, 1939, and made in E.A. No. 378 of 1939 in O.S. No. 26 of 1936.

K. Umamaheswaram for Appellant.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellant obtained a decree on the 18th March, 1936 for what is described in his plaint as rent or damages for use and occupation the period covered by these arrears being from the 15th December, 1932 to 15th October, 1935. He also got a decree for land cess in respect of the same lands for the period from the 30th June, 1931 to 30th June, 1935. At the time when he obtained this decree in the ordinary Civil Court no question was raised as to the jurisdiction of the Court. When Act IV of 1938 came into force the judgment-debtor filed an application under sections 8, 15 and 19 of that Act praying the Court to scale down the amount due under the decree. He did not make any deposit of rent for faslis 1346 and 1347 as contemplated in section 15 and the District Munsiff dismissed the petition for want of such deposit. In appeal the learned Subordinate Judge held that the rent which was decreed was not rent as defined by Act IV of 1938 and that the decree had to be scaled down therefore as a decree for a debt.

It is contended in appeal before us that this decision is wrong, mainly because it was held by a Bench of this Court in *Kondappa Naidu* v. *Mahalakshmamma*,[1] that the enlargement of the definition of "estate" in section 3 (2) (*d*) of the Madras Estates Land Act as amended by the Act of 1936 should be taken to be declaratory and as having a retrospective effect. The argument is that the appellant should be deemed to have been a landholder of an estate under the Estates Land Act and the rent decreed in the previous suit should be deemed to have been rent due to him as such landholder, even though he did not sue as a landholder of an estate and got his decree on the basis of an ordinary contract. The whole of this argument depends upon the assumption that in the case just cited it was laid down as a general proposition of universal application that all estates newly brought under the Madras Estates Land Act by the amendment of 1936 must be deemed to have been estates under that act for all purposes in the past and that the retrospective declaration of the nature of these estates must govern even completed judicial proceedings and divest vested rights. It does not appear to us that any such decision can be spelt out of the case cited. The learned Judges who heard that case were dealing with Letters Patent appeals, which had a long antecedent history, the main question at issue being whether the suits in question were suits over which the Revenue Court or the Civil Court had jurisdiction. While the Letters Patent appeals were pending, Madras Act VIII of 1934 came into force and under section 127 of that Act a stay was obtained. The effect of section 13 of Act XVIII of 1936 was to provide that all proceedings stayed under section

1. (1938) 1 M.L.J. 206.

Narayana Gajapati Raju *v.* Narasimhulu.

Wadsworth, J.

127 of the 1934 Act were to be disposed of, as if the amended Act for 1936 had been in force at the original institution of the proceedings. This plain statutory provision clearly governed the case and it was necessary to treat this long pending litigation as if the amended Act of 1936 had been applicable to it at its inception. It was merely to repel an argument advanced against the plain meaning of the statute that the learned Judges had occasion to observe that the Act was declaratory and retrospective the observation clearly having reference to the effect of section 13 of Act XVIII of 1936. We see no reason to extend this observation to facts which were not in contemplation of the learned Judges or to hold, when there are vested rights under contracts which were lawful at the time when they were made and have formed the subject of adjudications before there was any question of subsequent litigation applying to them, that this subsequent litigation will have the effect of destroying those rights or of making the adjudication into something which they were not. Clearly in the present case the decree was passed for an ordinary contractual rent which alone could be claimed at the time when the Court dealt with the matter. We see no reason to hold that the effect of the amendment of 1936 to the Madras Estates Land Act will be to change the character of that rent or the relations of the parties as they stood at the time of the previous adjudication. It follows therefore that the lower Court was right in holding that this decree could be scaled down as a decree for a debt.

In two minor matters modification seems necessary. Since section 15 has no application, there seems no reason to apply section 16 either, section 16 being merely a rider to section 15. The decree for land cess will therefore have to be scaled down as any other decree for a debt and to the extent to which the arrears were due before the 1st October, 1932, the interest thereon outstanding as on 1st October, 1937, will be liable to be cancelled and subsequent interest will have to be at the decree rate. To the extent to which the arrears accrued due after the 1st October, 1932, the interest on land cess will have to be reduced to five per cent. under section 9 up to the 22nd March, 1938, and thereafter the decree rate will prevail. The decree for costs must also be treated as a debt incurred on the date of the decree and interest on costs will run under section 9 at five per cent. up to the 22nd March, 1938, and thereafter at the decree rate. Subject to these modifications the appeal is dismissed with costs.

B.V.V. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Rangaswami Goundan and others .. *Appellants** (*Petrs.*)

v.

Kandaswami Goundan and another .. *Respondents* (*Respts.*).

Rangaswami Goundan *v.* Kandaswami Goundan,

Hindu Law—Joint family—Suit on promissory note executed by father—Sons not impleaded—Representative character of father not disclosed—Decree whether binding on sons—Partition between father and sons—Remedy of decree-holder by suit and not by execution.

*A.A.A.O. No. 9 of 1940. 6th April, 1942.

Rangaswami Goundan
v.
Kandaswami Goundan.

The decision in *Venkatanarayana* v. *Somaraju*, (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.) cannot be read as establishing the universal proposition that whenever the *manager* of a joint Hindu family is sued the members of the family must be deemed to be represented by him. Whether they are or not so represented is a question of fact depending upon many things, the nature of the claim, the language of the plaint, the subject-matter of the suit and the issues which require decision before a decree is given.

Where the father recited in the promissory note that he had borrowed money "for family expenses" and that assertion was repeated in the plaint but it was an unnecessary assertion the truth of which was not put in issue, and the plaintiff did not implead the sons or ask for any adjudication which would have the effect of binding them and merely relied on the doctrine of pious obligation,

Held, that it could not be said under the circumstances that the father was sued as the representative of his family, still less that he in fact represented it.

Held, further, that where the sons are separated from the father when execution of such a decree is sought, the remedy of the decree-holder against the family property which had passed to the sons lay by way of a separate suit and not by proceeding in execution.

Kuppan Chettiar v. *Masa Goundan*, (1937) 1 M.L.J. 249: I.L.R. (1937) Mad. 1004 and *Official Receiver, Guntur* v. *Seshayya*, (1940) 2 M.L.J. 860, relied on.

Appeal against the order of the District Court of Coimbatore, dated the 13th October, 1939, and passed in A.S. No. 273 of 1939 (C.M.P. No. 1542 of 1938 in E.P.R. No. 830 of 1938 in O.S. No. 723 of 1935, District Munsiff's Court, Udumalpet).

P. N. Appuswami Aiyar for Appellants.

A. C. Sampath Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of execution proceedings in O.S. No. 723 of 1935. That was a suit brought by the assignee of a promissory note executed by one Nanjappa Goundan in 1930, and was brought against Nanjappa Goundan alone. A decree was granted against Nanjappa Goundan in 1935. Subsequently Nanjappa Goundan became insolvent. In 1937 Nanjappa Goundan and his four sons partitioned their property. In 1938 the decree-holder sought to execute his decree against the family property which had thus passed into the ownership of the sons. Three of the four sons claimed that this could not be done. Both the learned District Munsiff of Udumalpet and the learned District Judge of Coimbatore decided against them and ordered execution to proceed. This is a second appeal by the three sons.

It is first objected by the decree-holder (respondent 1) that no appeal lies, the argument being that as the appellants filed a claim petition their only remedy is by suit. But the very point upon which both Courts rejected the claim was that in essence the appellants were parties to O.S. No. 723 of 1935 being represented therein by their father. From decisions based upon this reasoning there must obviously be a right of appeal. The preliminary objection therefore must be overruled.

In holding that Nanjappa Goundan's sons were represented by Nanjappa Goundan in O.S. No. 723 of 1935 both Courts have relied upon the Full Bench ruling reported in *Venkata-*

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narayana v. *Somaraju*,[1] but they have done so in very brief judgments and without any adequate discussion of the significance of that decision or of its applicability to the facts of this case. It is impossible, I think, to read *Venkatanarayana* v. *Somaraju*,[1] as establishing the universal proposition that whenever the manager of a joint Hindu family is sued the members of the family must be deemed to be represented by him. Whether they are or are not so represented is a question of fact depending upon many things, the nature of the claim, the language of the plaint, the subject-matter of the suit, and the issues which require decision before the decree can be given. In *Venkatanarayana* v. *Somaraju*,[1] the suit was for mesne profits realised from property enjoyed as a joint family property, and there was no possibility of conflict between father and son upon the issues involved. Here the suit was upon a promissory note. If the sons had been specifically impleaded they could have resisted it upon grounds which were not open to the father. No doubt the father recites in the promissory note that he has borrowed money "for family expenses" and this assertion is repeated in the plaint, but it was an unnecessary assertion the truth of which was not put in issue. All that the decree-holder had to prove if proof should be necessary at all was that the money was in fact borrowed. He did not implead the sons, he asked for no adjudication which would necessarily have the effect of binding them, and relies now solely upon the doctrine of pious obligation. It seems to me impossible in these circumstances to say that Nanjappa Goundan was even sued as the representative of his family; still less that he in fact represented it.

What then is the position if the appellants be held not to have been parties to the suit? They are now separated from their father, and this case falls exactly within the scope of *Kuppan Chettiar* v. *Masa Goundan*,[2] which has been followed with approval by *Official Receiver, Guntur* v. *Seshayya*.[3] Those cases lay it down that the remedy of a decree-holder against the father who wishes to proceed in such circumstances against the sons' shares lies not in execution but in the filing of a separate suit.

I am asked by the learned advocate for the respondent 1, however, not to follow these decisions, but to refer this matter to a Full Bench. In support of this request he refers to the opinions expressed by the learned Judges in *Venkatanarayana* v. *Somaraju*[1] doubting the correctness of the law as laid down in *Kuppan Chettiar* v. *Masa Goundan*.[2] I am not prepared to accede to this request in the peculiar circumstances of this case. If the sons were not constructively parties to the decree, then any liability of theirs based upon the doctrine of pious obligation can extend only to the discharge of their father's debts and the

1. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).
2. (1937) 1 M.L.J. 249: I.L.R. 1937 Mad. 1004.
3. (1940) 2 M.L.J. 860.

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question of the discharge of those debts is now one for the Insolvency Court. The question therefore whether respondent 1's proper remedy against the appellants would in other circumstances be by execution or by suit is purely academic when the appellants' father has been adjudicated an insolvent.

This appeal must therefore be allowed, and the execution petition dismissed with costs throughout as against the appellants.

Leave refused.

B.V.V. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Shenbagavadivammal .. *Appellant* (Plff.-1st Respt.)*

v.

Mupidathi Ammal and others .. *Respondents (Defts.-Applts. and 2nd Respt.).*

Shenbagavadivammal v. Mupidathi Ammal.

Transfer of Property Act (IV of 1882), *section* 6 (a)—Spes successionis —*Transfer in lieu of—Validity—Avoidance—Party receiving benefit—Duty to compensate other party—Contract Act (IX of* 1872), *section* 65.

One *T* died leaving behind him two co-widows, a sister and a sister's son. There was a dispute amongst them as to the disposal of *T's* estate and the dispute was referred to arbitration, and the award of the arbitrators was to the effect that a portion of the estate was to be conveyed by the co-widows to the sister and sister's son, and in return therefor the latter should release all their rights as prospective reversioners to the other portions of *T's* estate and that the sister's son should perform the funeral ceremonies of *T*. It appeared that possession of the properties allotted to them was taken by the sister and sister's son in pursuance of the award. Later on one of the widows instituted a suit for partition of the properties allotted to the sister and the sister's son.

Held, that the transfer to the sister and the sister's son was invalid as the consideration for the transfer was their promise to transfer their rights in other portions of *T's* estate, which was forbidden by section 6 (*a*) of the Transfer of Property Act; and the transfer was invalid even though a portion of the consideration was the services rendered by the sister's son in performing the funeral ceremonies.

Held, however, that the plaintiff was bound under section 65 of the Contract Act to make compensation to the sister and sister's son before she recovered possession of the property.

Appeal against the decree of the District Court of Tinnevelly in A.S. No. 208 of 1939 preferred against the decree of the Court of the District Munsiff of Tinnevelly in O. S. No. 59 of 1938.

T. K. Subramania Pillai for Appellant.

K. R. Rangaswami Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal is concerned with part of the estate of one Thangappa Pillai, who died in 1934 leaving no issue but two widows, a sister and a sister's son. The two widows are plaintiff and the 3rd defendant. First defendant is Thangappa Pillai's sister and 2nd defendant is 1st defendant's son. There

*S.A. No. 133 of 1941. 7th April, 1942.

Shenbaga-vadivammal v. Mupidathi Ammal.

was a dispute amongst these persons as to the disposal of Thangappa Pillai's estate and the dispute was submitted to arbitration. The award of the arbitrators was to the effect that the portion of the estate which forms the subject-matter of the present suit was to be conveyed by plaintiff and the 3rd defendant to defendants 1 and 2 and that in return for this, the defendants 1 and 2 should release all their rights as prospective reversioners to the other portions of Thangappa Pillai's estate and defendant 2 should perform the funeral ceremonies of Thangappa Pillai. It has been found therefore that the consideration for the transfer by the plaintiff and the 3rd defendant to defendants 1 and 2 of the property which forms the subject-matter of the suit was twofold: (1) the services rendered by the 2nd defendant in performing the funeral obsequies of Thangappa Pillai and (2) the promise of defendants 1 and 2 to release their rights in other property. A few months after Thangappa Pillai died, there was a partition between plaintiff and the 3rd defendant, and it is now the plaintiff alone who sues to recover possession of the property which plaintiff and 3rd defendant in accordance with the award of the arbitrators had made over to the defendants 1 and 2. There is no dispute on the part of the 3rd defendant to plaintiff's claim. I have said that plaintiff and the 3rd defendant made over this property in pursuance of the award. It must be mentioned here that this was not the plaintiff's case. According to her, the possession by defendants 1 and 2 was the result of trespass and she sought to recover possession upon her title as against trespassers. It has, however, been found as a fact that the possession was taken by defendants 1 and 2 in pursuance of the award. Whether therefore there was any ceremony by which possession was actually handed over by plaintiff and the 3rd defendant or not, it seems to me quite clear that in effect there was a transfer by plaintiff and 3rd defendant to defendants 1 and 2, and this suit therefore must now be considered as one to set aside a transaction which, on the face of it, was a transfer.

The main question which has been argued is whether such a transfer is or is not invalid. It seems to me from a consideration of section 6 of the Transfer of Property Act that it certainly is invalid. Section 6 (*h*) says:

"No transfer can be made .... for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act."

Section 23 says that "the consideration or object of an agreement is lawful, unless it is forbidden by law". One of the items of consideration for the transfer by plaintiff and the 3rd defendant was the promise of defendants 1 and 2 to transfer their rights in the other portions of Thangappa Pillai's estate. That transfer is forbidden by law [*see* section 6 (*a*)]. Therefore section 6 (*h*) applies to the transfer by the plaintiffs and the 3rd defendant and therefore that transfer would certainly be invalid if this were the sole consideration.

It has been argued for the respondent, that because this was not the only consideration for the transfer but there was also the question of the services rendered by the 2nd defendant in perform-

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ing the funeral ceremonies, the transfer cannot be set aside as invalid. But it seems to me, that if any portion of the consideration is forbidden by law, the necessary result must be that the whole transfer should be set aside. I accordingly hold that the transfer by the plaintiff and the 3rd defendant to defendants 1 and 2 of the subject-matter of this suit is not valid and therefore that defendants 1 and 2 can have no title under it to retain possession of the property.

There will, however, now be an obvious situation for the application of section 65 of the Indian Contract Act. The agreement between the parties that the 1st and 2nd defendants should release their rights in certain property to plaintiff and 3rd defendant has now been discovered to be void, and it is the case of the 1st and 2nd defendants, a case which has been found to be true by the Courts below, that the plaintiff and the 3rd defendant have received an advantage under this agreement. Under section 65, therefore, it is obligatory upon the plaintiff to make compensation to defendants 1 and 2 before she can recover possession of the property which is the subject-matter of this suit. The learned District Judge refused to consider these points of law, whether the transfer was invalid, and if so, whether the defendants had any right to compensation; because the questions were not raised in the pleadings. It seems to me that this attitude cannot be justified. It is the clear duty of the Court to apply the law to the facts which it finds. And if the law is, as I have stated it, on the facts found, *viz.*, that the transfer was invalid, it seems to me quite clearly the duty of the Court to declare it to be invalid, and to assess the compensation payable to defendants 1 and 2.

This appeal will accordingly be allowed and the suit remanded to the Court of first instance. It is not necessary, in accordance with the request made to me on behalf of the respondent, that the plaintiff should be asked to amend her plaint. The basis of what must now be her claim has been made quite clear by the judgments of the various Courts. The only question which now requires consideration is what compensation she must pay to defendants 1 and 2. The next step, therefore, in the conduct of the suit will be for these defendants to set out in an amended written statement what is the compensation which they claim. The Court of first instance will then proceed to try that particular issue and pass a decree in accordance with its findings, *i.e.*, that possession of the suit properties shall be restored by defendants 1 and 2 to plaintiff upon payment by her to them of a certain sum of money. The question of costs will be left to the discretion of the learned District Munsiff. Leave refused.

B.V.V. ——— *Case remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD ATKIN, LORD THANKERTON, LORD ROMER, SIR GEORGE RANKIN AND SIR SIDNEY ABRAHAMS.

Secretary of State .. *Appellant**

v.

Srimath Vidhya Sri Varada Thirta Swamigal and others .. *Respondents.*

P.C.

Secretary of State *v.* Sri Varada Thirta Swamigal.

Inam—Grant as 'Kattuguthagai *village'—Nature of right conferred—Subsidiary channels within the village—Ownership of bed and banks—Irrigation rights of inamdar—Measure of—Madras Irrigation Cess Act,* (*VII of* 1865), *section* 1, *proviso.*

A whole inam village in the Tinnevelly District granted by a Mahomedan ruler in 1753 and confirmed later by the British Government was described as "granted on *kattuguthagai* tenure for the support of Vyasarayamatam" a religious institution in the Mysore State. The village was irrigated by water drawn from the Tambraparni river into a channel regulated by a sluice which the Government controlled. Water-cess was levied by the Government under the Madras Irrigation Cess Act (VII of 1865) for the years 1920 and 1922 from the respective lessees of the lands, on the footing that the tenants were entitled to free irrigation of the lands, only in respect of the extent recognised as wet at the inam settlement of 1864 and that water cess was payable in respect of wet land on which two crops had been raised where one only was raised in 1864 and also where wet crop had been raised on land which was dry land in 1864.

In suits filed by the lessees against the Secretary of State for India in Council for recovery of the sums paid as such water cess,

Held: *Kattuguthagai* is in essence a lease or grant of land at a favourable rent and there is nothing in the term itself from which one is entitled to infer that what was handed over was only the *Melwaram.*

In a whole *Kattuguthagai* village the inam right extends to all the village lands and the fact that the words "besides poramboke" had not been inserted in the title-deed made out in 1865 upon a form not specially adapted to the case of whole village inams does not affect the position. It is impossible to imply any reservation of the beds or banks of the subsidiary channels by the grantor having regard to their number and distribution throughout the village.

The limit or measure of the inamdar's right to water is not the extent of land cultivated as wet, at the time of the inam settlement, but is set by the physical conditions such as the size of the channels and the nature and extent of the sluices or weirs, if any, governing the amount of water which enters the channels.

The *Urlam Case,* (1917) I.L.R. 40 Mad. 886 (P.C.), applied.

Quaere:—Whether the inamdar's right to obtain water without payment of the sluices or weirs, if any, governing the amount of water which enters particular case of dams which do not function automatically and without some seasonal control.

Appeal from the High Court of Judicature at Madras preferred against the judgment, dated 29th March, 1935, preferred against the judgment of the Subordinate Judge of Tinnevelly dismissing the appeal against the decree and judgment of the District Munsiff of Ambasamudram in the Tinnevelly District.

J. Millard Tucker, K. C., J. M. Pringle and *S. P. Khambatta* for Appellant.

J. M. Parikh and *P. V. Subba Rao* for Respondents.

Their Lordships' Judgment was delivered by

*P. C. A. No. 63 of 1939. 18th December, 1941.

P.C.

Secretary of State *v.* Sri Varada Thirta Swamigal.

Sir George Rankin.

SIR GEORGE RANKIN.—This case comes from the Ambasamudram taluk in west of the Tinnevelly district of Madras. In this taluk are the principal sources of the Tambraparni river, and its irrigation system is both ancient and extensive. Numerous anicuts or dams cross the Tambraparni and its affluents, supplying channels and tanks in a manner which is acknowledged to reflect the highest credit upon the skill and energy of the ancient Governments who constructed them.

The two suits out of which this appeal arises were brought in the Court of the District Munsiff of Ambasamudram against the Secretary of State for India in Council for recovery of certain sums paid as water cess under the Madras Irrigation Cess Act (Madras Act 7 of 1865). Both suits had reference to the village of Vagaikulam in Tinnevelly, and the plaintiff in each case was a lessee from the head of a math situated in Mysore which claims to have held the village ever since 1753. The first suit was numbered 412 of 1921 and was brought on 21st December, 1921, by the math's lessee for the years 1912 to 1921 to recover Rs. 584-5-6 paid for the year 1920. The second suit was numbered 383 of 1924 and was brought on 26th November, 1924, by the math's lessee for the years 1922 to 1931 to recover Rs. 707-3-8 paid for the year 1923. These sums had been levied on the footing that the plaintiffs are entitled to free irrigation of the village lands only in respect of the extent recognised as wet at the inam settlement of 1864; hence that water cess is payable in respect of wet land on which two crops have been raised where one only was raised in 1864, and also where a wet crop has been raised on land which was dry land in 1864. The figures of 1864 are: dry land, 67·91 acres; wet land, 329·60 acres. Save that in the first suit, the head of the math was added as a second plaintiff, the only parties are his lessees on the one hand and the Secretary of State in Council on the other. No ryots or other cultivators of the village lands were at any time before the Court as parties. The suits succeeded before the District Munsiff who heard them together, and on 21st December, 1925 made decrees negativing the Secretary of State's contention as to the measure of the plaintiffs' right and ordering him to refund the monies paid with interest. The Subordinate Judge of Tinnevelly dismissed the Secretary of State's appeals on 10th November, 1927, and on second appeals being brought to the High Court at Madras these also were dismissed on 29th March, 1935.

Vagaikulam village is irrigated by water drawn from the Tambraparni into a channel called the North Kodai Melalagion Kal ("the N. K. Channel"). The water is drawn from the river into this channel by a dam or anicut of ancient date—not a permanent or masonry structure but one erected by Government each year by means of palmyra posts and logs—and the water so led into the channel is regulated by a sluice which Government control. The channel is known to have been in existence in the seventeenth century. It leaves the river at a point which is said to be some ten miles from the village of Vagaikulam and it runs northwards until it comes to the western boundary of the village. It crosses the boundary and runs for a considerable distance

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Held: *Kattuguthagai* is in essence a lease or grant of land at a favourable rent and there is nothing in the term itself from which one is entitled to infer that what was handed over was only the *Melwaram.*

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The *Urlam case,* (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 (P.C.), applied.

Quaere:—Whether the inamdar's right to obtain water without payment of separate charge can or ought to be defeated by the Government in the particular case of dams which do not function automatically and without some seasonal control.

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The two suits out of which this appeal arises were brought in the Court of the District Munsiff of Ambasamudram against the Secretary of State for India in Council for recovery of certain sums paid as water cess under the Madras Irrigation Cess Act (Madras Act VII of 1865). Both suits had reference to the village of Vagaikulam in Tinnevelly, and the plaintiff in each case was a lessee from the head of a math situated in Mysore which claims to have held the village ever since 1753. The first suit was numbered 412 of 1921 and was brought on 21st December, 1921, by the math's lessee for the years 1912 to 1921 to recover Rs. 584-5-6 paid for the year 1920. The second suit was numbered 383 of 1924 and was brought on 26th November, 1924, by the math's lessee for the years 1922 to 1931 to recover Rs. 707-3-8 paid for the year 1923. These sums had been levied on the footing that the plaintiffs are entitled to free irrigation of the village lands only in respect of the extent recognised as wet at the inam settlement of 1864; hence that water cess is payable in respect of wet land on which two crops have been raised where one only was raised in 1864, and also where a wet crop has been raised on land which was dry land in 1864. The figures of 1864 are: dry land, 67·91 acres; wet land, 329·60 acres. Save that in the first suit, the head of the math was added as a second plaintiff, the only parties are his lessees on the one hand and the Secretary of State in Council on the other. No ryots or other cultivators of the village lands were at any time before the Court as parties. The suits succeeded before the District Munsiff who heard them together, and on 21st December, 1925, made decrees negativing the Secretary of State's contention as to the measure of the plaintiffs' right and ordering him to refund the monies paid with interest. The Subordinate Judge of Tinnevelly dismissed the Secretary of State's appeals on 10th November, 1927, and on second appeals being brought to the High Court at Madras these also were dismissed on 29th March, 1935.

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within the confines of the village but alongside the western boundary. Thereafter its course takes it into a Government village called Manarkoil where it ends in a tank. From that part of its course, both inside and outside the village, where it runs along or is near to the western boundary of Vagaikulam, several branch channels with open heads lead water into the interior of the village. Either directly or by means of tanks the water is then taken to irrigate the lands of this village and of other villages as well; so that Vagaikulam must be regarded as bound in respect of these channels to pay respect to the rights of riparian owners lower down the stream. The Government village of Manarkoil, which gets its water from the N. K. Channel after this channel has in its northward course recrossed the western boundary of Vagaikulam, has in the past shared the water of the channel with Vagaikulam village by a system of turns (murai). According to this system Vagaikulam has taken all it can get for three days, and Manarkoil for two days has taken all it can get save that a small fixed quantity of water is allowed to flow into Vagaikulam—the month being thus divided into 18 days for the inam and 12 for the ayan (Government) village. The plaintiffs make this murai system a separate ground of objection to any claim for water cess, saying that they are entitled by custom to the quantity of water which they have been enjoying irrespective of the extent of cultivation for which it has been used. Their Lordships do not find it necessary however to deal with this contention.

The right of Government to charge the inamdar with water cess in these circumstances depends upon the terms of the Madras Irrigation Cess Act VII of 1865 as amended by later Acts. By the first section of that enactment as it now stands, the inamdar is *prima facie* chargeable in such a case as the present, subject to two provisos, of which the first is of substantive importance for the present appeal:

"Provided that where a zemindar or inamdar or any other description of landholder not holding under ryotwari settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more."

The plaintiffs have therefore to make out an engagement between Government and the inamdar entitling the latter to water free of separate charge; but as it is not contended by Government that water cess can be charged in respect of wet crops taken into account at the inam settlement of 1864 the disputed question between the parties is not whether there was any such engagement but what that engagement was—in other words, What is the measure of the right to water which the inam title confers upon the math?

The plaintiffs say that the principles applied by the Board in the *Urlam case*[1] are applicable to this case notwithstanding that Urlam was a zemindary vested in the zemindar as his permanent property by the Permanent Settlement Regulation XXV of

1. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 (P.C.).

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1802, whereas Vagaikulam is an inam village. They contend that the N. K. Channel so far as it lies within the village boundary is vested in the inamdar, as also are the subsidiary channels from which the water is taken to irrigate the village lands: hence that the limit or measure of the inamdar's right to water is not the extent of land cultivated as wet, but is set by the physical conditions such as the size of the channels and the nature and extent of the sluices or weirs, if any, governing the amount of water which enters the channels. This is the view which has been unanimously accepted by the Courts in India.

In reply to it the arguments skilfully advanced by Mr. Tucker and Mr. Pringle on behalf of the Secretary of State may be summarized in their Lordships' view as four:—first, that the inamdar has no right in the village lands save as a mere assignee of the Government's right to the revenue or part thereof; secondly, that in any case the inamdar has no title to the N. K. Channel or any part thereof or to the subsidiary channels because these are really wet or river poramboke and poramboke is not covered by the inamdar's title and was not recognized as his at the inam settlement of 1864; thirdly, that in any event having regard to the importance of the N. K. Channel and the subsidiary channels in the irrigation system which Government had set up and was working an exception of them must be read by implication into any grant of the village as a whole; fourthly, that Government having control of the dam by which alone water is made to enter the N. K. Channel the inamdar is not within the meaning of the proviso "entitled to irrigation" even if he be found entitled to use such water as Government may choose to allow to flow into the N. K. Channel or its subsidiaries.

It may here be observed that none of these contentions is intended as maintaining that the N. K. Channel or any other water channel with which this case is concerned belongs to any cultivator or cultivators, the claim of the defendant being, as his written statement and the issues show, that they belong to Government. He denies the title of the inamdar and claims title in himself. Their Lordships have not before them a claim by a cultivator to have such an interest in the land as is now commonly referred to as the kudivaram right. The burden which such a claimant would have to discharge, the principles applicable to his claim and the special considerations which arise where the inamdar is a math were all dealt with by the Board in the *Tanjore case*,[1] as well as in *Suryanarayana* v. *Patanna*[2] and *Upadrashta Venkata Sastrulu* v. *Divi Seetharamudu*,[3] which were cases from the Northern Circars. But the present issue is between the grantor and grantee of the inam right and has reference to the year 1753 which was the date of the inam grant. It is to be determined on the basis of the grant and on the evidence afforded by the docu-

1. (1924) 46 M.L.J. 546: L.R. 51 I.A. 83: I.L.R. 47 Mad. 337 (P.C.).
2. (1918) 36 M.L.J. 585: L.R. 45 I.A. 209: I.L.R. 41 Mad. 1012 (P.C.).
3. (1919) 37 M.L.J. 42: L.R. 46 I.A. 123: I.L.R. 43 Mad. 166 (P.C.).

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ments which came into existence when the grant was confirmed by the inam commissioner in 1864. The ultimate question is whether the math is owner of the lands in such sense that by its inam title it has an "engagement" with Government entitling it to take without separate charge such water as the channels within the village boundaries may receive from time to time according to the state of the upper water. This may or may not be the same as the question: What is the inference to be drawn from the documents as to the existence in 1753 of cultivators having permanent right in the lands of this village? But an answer to the latter question must be given first.

The inamdar's title is derived from an admitted grant made by the Mahomedan Ruler in 1753. The written instrument itself is not in evidence or any copy of it, but a copy of it is proved to have been produced to the inam commissioner or his officers in 1864. In Ex. A which is an extract from the inam register then compiled it is described as a parwana a word which was applied to written orders of different types and which of itself throws no light upon the matters now in dispute. This register shows that the inam had been put forward and accepted as such on various occasions in documents of 1801, 1804 and 1820, and in an inam register previously compiled or attempted in 1814. It had stood all along in the name of the math and there was no difficulty whatever in establishing 50 years' enjoyment of the inam, which was sufficient under the rules to make a good title apart from the deed of grant itself. From 1816 to 1828, it is recorded, the village had been placed under attachment for arrears of jodi or quit-rent. In the register of 1814 it had been described as "granted on kattuguthagai tenure for the support of Vyasaraya matam" that is, of the math in Mysore State. In the column of the register which describes the liability to tax or revenue the word kattuguthagai is followed by the words "or fixed jodi" which their Lordships take to be a correct equivalent of its immediate meaning, as the trial Judge in the present case has so considered it. The word "guthagai" will be found used in the sense of rent or revenue in the *Tanjore case*[1] already mentioned (*see* p. 85 of the report in 51 I.A. 83) and is probably connected with the word "gutta" or "guta" which occurs in more than one language and in Wilson's Glossary is said to mean "farm, lease or rent". In the *Tanjore case*,[1] it was used with a prefix "rokka" signifying money and in the present case the prefix "kattu" is from a word of which the root meaning is to "bind". Etymology however is one thing and the meaning of the word as used may be another. In col. 14 of the register of 1864, the word "bil-mukta" is given as an equivalent; this seems to mean "according to agreement" "stipulated" or "fixed" and is sometimes applied to the tenure as well as to the rent or revenue. A bil-mukta inam according to Wilson's Glossary is "a grant of land at a low fixed rent."

On the face of the register this inam was a whole village inam—"a whole kattuguthagai village" is the expression in col.

1. (1924) 46 M.L.J. 546: L.R. 51 I.A. 83: I.L.R. 47 Mad. 337 (P.C.).

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21. There are entries which show that there had been no encroachment within the previous 50 years requiring any further imposition to be made—the total area of the village being the same as in 1801. The area of dry and wet poramboke was deducted for the purpose of computing the assessment of the village. Two minor inam areas were added to this inam, the total jodi or quit-rent being raised in this way from 1974-13-6 to 1981-3-8 by adding the jodi borne by them, but in truth the old jodi was retained for this village. The "extent for title-deed" of this whole village inam is calculated at the figures upon which Government now relies as providing the measure of the inamdar's right to water free of separate charge, *viz.*: dry, 67·91 acres, wet 329·60 acres. The assessment is put at Rs. 3,091-6-2 the village being described as in a flourishing condition. The decision of the deputy collector of the inam commission is dated 1st June, 1864—"to be confirmed under rule 3, col. 1 jodi Rs. 1974-13-6." This refers to the Inam Rules of 1859 which governed the commission and which contained directions as to the terms upon which the different kinds of inams should be recognized according as they were for charitable purposes or were personal grants, grants for services no longer of value or village service grants. In some cases, the inams were only continued upon the terms of a jodi or an additional jodi being imposed, in others they were continued only for a life or lives. But the Vagaikulam village being a religious inam—in col. 2 dharmadayam is the entry—it came under rule 3 and fell to be continued to the holders and their successors without any further interference and permanently so long as the institutions were maintained in an efficient state and the services continued to be performed. The title-deed was granted on 27th July, 1865 in these terms:

"Title-deed granted to the manager for the time being of Vyasarayaswami matam.

1. On behalf of the Governor-in-Council of Madras I acknowledge your title to the Religious Endowment Inam village of Vagaikulam, in the taluk of Ambasamudram, in the district of Tinnevelly claimed to be of acres sixty seven (67·91) of dry land and acres three hundred and twenty nine (329·60) of wet land held for the support of the above matam in Sosolai in Mysore Territory.

2. This inam is confirmed to you and your successor subject to the existing quit-rent of Rs. 1981-3-8 per annum to be held without interference so long as the conditions of the grant are duly fulfilled. (This includes the assessment of two minor inams.)

3. If you should desire to commute the quit-rent for the payment of a sum of money, once for all, equal to (20) twenty years' purchase of the quit-rent you will be at liberty to do so.

(Signed).

Officiating Inam Commissioner.

Coimbatore

27th July, 1865.

Rs. 3,091-6-2. The seal of the Inam Commissioner, Madras."

This deed was issued pursuant to rule 30 of the Inam Rules which required a title-deed to be "at once furnished to the inamdar acknowledging his title to the inam on its present tenure and

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specifying the terms upon which this tenure may be converted into a freehold." The form was that numbered 6 in Appendix H to the rules which was the form applicable to religious inams but was not adapted to the particular case of "whole village" inams. For the case of whole village inams it was sometimes as reported cases show, *Venkataratnammah* v. *Secretary of State*,[1] *Secretary of State* v. *Raghunatha Tathachariar*,[2] adapted or made clearer by the addition in writing in the margin of the words "besides poramboke": since the area specified as "claimed" could not be the whole area of the village inamdars and officials might well think that an inappropriate form needed to be made as plain as possible. In the present case, as in most cases, the inamdar never attempted to commute the quit-rent and their Lordships say nothing as to other parts of the form which were directed to the right of commutation.

The true inference from these materials as to the character of the inam right granted in 1753 is not much affected by the Madras Acts IV of 1862, IV of 1866 and VIII of 1869. Sometime in 1867 it was discovered that inamdars who had no rights save in the revenue of lands were attempting to evict the proprietors on the strength of the title-deeds which had been granted to them by the inam commission. These deeds and certain expressions in the Inam Rules and in the Acts of 1862 and 1866 led Government to repent of having used phrases such as "freehold," "absolute freehold" and even of the use of the words "land" and "lands" in connexion with inams. Government also discovered that the title-deeds and indeed the scheme of the inam settlement were fundamentally invalid. They had proceeded without legislative sanction and by agreement between the inamdar and the Government under the minute of Sir Charles Trevelyan, dated 13th May, 1859, issued at once upon his taking office as Governor. But the lands were not vested in the Government of Madras but in Her Majesty and could only be disposed of in the name of the Secretary of State in Council. To remove this last difficulty, an Act of Parliament was required and thus was passed the statute 32 and 33 Victoria, cap. 29. To remove the difficulties created by the ill-advised language of the Rules, Acts and title-deeds, Madras Act VIII of 1869 referred in its preamble to "the rights and interests which other persons may have in lands from which the inams are derived or drawn in cases where inam-holders do not possess the proprietary right in the soil but only the right of receiving the rent or tax payable to Government in respect of the inam land as transferees of the Government." It provided as follows:

"Nothing contained in any title-deed heretofore issued to any inam-holder shall be deemed to define, limit, infringe or destroy the rights of any description of holders or occupiers of the lands from which any inam is derived or drawn or to affect the interests of any person other than the inam-holder named in the title-deed; and nothing contained in Madras Act IV of 1862 or in Madras Act IV of 1866 shall be deemed to confer on any inam-holder any right to land which he would not otherwise possess."

1. (1912) 23 M.L.J. 109: I.L.R. 37 Mad. 364*n*.
2. (1912) 24 M.L.J. 31: I.L.R. 38 Mad. 108.

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It is perhaps sufficient for the purposes of the present case to observe that no point whatever need be made or reliance placed on Madras Act IV of 1862; but that the title-deed and the entries in the inam register are evidence of the true intent and effect of the transaction of 1753 and of the character of the right which in 1864 was being recognised and continued. The Act of 1869 creates no presumption that the view entertained by the inam commission was unfounded, and unquestionably in many cases the inam right does comprise the proprietary right in the soil. While the Act extends a certain protection to holders and occupiers of the lands it contains no provision entitling Government to derogate from its own grant or from the grant which it has recognised and confirmed. On the other hand, if once it appear that the grant of 1753 carried no right to the land but only a right in the revenue from the village the proceedings of the inam commission will have no effect to change its character or to vest in the inamdar a subject-matter not belonging to him, *Secretary of State* v. *Srinivasa Chariar*.[1] That however is the very question for decision.

In these circumstances as the entries in the register speak of kattuguthagai tenure and of the inamdar as kattuguthagaidar the first effort must be to ascertain whether these terms can be shown to import a right to the land itself or an interest limited to the revenue. In the Glossary of Judicial and Revenue Terms which was published in 1855 by Professor Horace Hayman Wilson 'kattuguttagai' is explained as meaning "land held in farm at a permanently fixed money rent which is usually light." It has been contended on behalf of the Secretary of State that this supports the suggestion that the inamdar in the present case was a mere farmer of the revenue or person interested in a profit rental—in much the same position as the ijaradar of Bengal who is called a "farmer of rents" in the Bengal Tenancy Act [section 22 (3)]. This seems to their Lordships to mistake the meaning of Wilson's definition and it may be as well to ascertain what the words "in farm" mean in the Glossary of 1855 which has been of such great assistance to their Lordships and to all the Courts of India. Professor Wilson held the Chair of Sanskrit at Oxford and was librarian to the East India Company, but his Glossary was compiled pursuant to a resolution of the Court of Directors from materials derived from all parts of India as well as from the stores of his own immense erudition. No reader of his Preface will have any doubt that many of his definitions or explanations date back in point of language to the early years of the nineteenth century. It is probably true that for almost a hundred years the verb "to farm" has been obsolete or infrequent in colloquial English in the sense of holding land from another or letting it out to another. It is now more commonly employed as meaning "to take fees, proceeds or profits of an office or tax on payment of a fixed sum." But neither in Wilson's Glossary nor in the sources from which he drew was the old meaning obsolete. The ancient opera-

1. (1921) 40 M.L.J. 262: L.R. 48 I.A. 56 at 67: I.L.R. 44 Mad. 421 (P.C.).

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tive words of an English lease were "demise, lease and to farm, let."

The term lease as used in English law is indeed almost as inapt in parts of India as the word "freehold" was found to be. For example, a lease cannot (apart from statute) be made to endure in perpetuity yet permanent tenancies of one sort or another are almost universal in India and are often without any written instrument of demise. For whatever reason "to hold land in farm," "farmers of land" and similar words were constantly employed and were employed by Wilson in his Glossary in connexion with land held of another person. For illustration the word swami-bhogam may be taken. In a note written in 1816 by Mr. Francis Whyte Ellis, Collector of Madras, and a great authority on Southern India, its languages, and its land tenures as well as upon Hindu law (*cf.* p. 40 of "Replies to Seventeen Questions. . . . . . Relative to Mirasi Right" Madras, 1818, republished in "Three Treatises on Mirasi Right" ed. by C. P. Brown, Madras, 1852) will be found this explanation of "swami-bhogam". "the rent paid for land held in farm from the mirasidar for a fixed period." In Wilson's Glossary the word is defined in the same language. "In the Tamil country it means the share of the produce or the rent which is paid to the mirasidar or hereditary proprietor by the tenant cultivator holding the land in farm for a fixed period." The words "holding in farm" are there applied to the actual cultivator and their meaning cannot be mistaken. Wilson's exposition of such words as "ijara," "thika," "gutta" shows that to him a "farm of land" or "farm of cultivation" is as natural an expression as "farm of revenue or rent".

It so happens that within a few years of the publication of the Glossary the case in *Venkateswara Yettiapah Naicker* v. *Alagoo Moottoo Sevagaren* [1] came up to the Board on appeal from the Suddar Dewanny Adawlut of Madras. Like this, it was a case from Tinnevelly. The plaintiff established before all the Courts that before the defendant's predecessor had been given his zemindary under the Permanent Settlement Regulation XXV of 1802, the plaintiff's ancestors had held the suit lands (fifteen villages) in regard of services of a semi-military nature by a tenure known as cuttoogootaga or java-tha—that is, at a light fixed jumma; also that in 1805 his father had arranged to take from the zemindar the same lands on a cuttoogootaga lease—a permanent lease of the land at a certain rent entitling him to use the land himself or let it out to others. The defendant's story which was rejected as false, was that the plaintiff had only come upon the land under a temporary lease or ijara of 1814, but it is not quite clear how the word "ijara" was intended to be understood. In the case lodged by the defendant as appellant there comes, in the same words as Wilson's Glossary had used, the explanation "the term cuttoogootaga means land held in farm at a permanently fixed money rent." Again it is not clear that this was thought to assist in showing that the plaintiff was

1. (1859-61) 8 M.I.A. 327 (P.C.)

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a mere farmer of rents. But in any view it was held by all the Courts who dealt with the case that the plaintiff had full right in the villages as he claimed. As the Zilla Court had held "The right claimed by the plaintiff is of the nature of a dependant talookdaree tenure expressly recognized by the Regulations." The Sudder Court held it to be "a fixed rent tenure." The word which appears in the judgment of the Board as "java-tha" and elsewhere in the record as "jeevithaporooppoo" means a grant of lands for maintenance at a fixed rent. Mr. Mayne from this decision collected "cuttoogootaga" is a term indicating a perpetual tenure at a low rent for past military services (Hindu Law and Usage, Edn. 6, page 514, Para. 398) but as the present case illustrates and as the inam commission disclosed this form of tenure may be granted for diverse purposes.

The matter does not rest there. The question is as to the meaning of kattuguttaga in this Tinnevelly village inam register. Now the Inam Commissioner, Mr. G. N. Taylor and his successor, Mr. W. T. Blair have provided their own dictionaries. Mr. Taylor had to take the orders of Government before settling the inams of this district and his proposals are to be seen in a minute dated 27th February, 1863. This was not put in evidence—perhaps because the contention as to the meaning of kattuguttagai was not placed before the trial Court. In any case their Lordships refer to this minute only as a dictionary though in fact it was rather more. "Kattuguttaga" Mr. Taylor explains "consists of lands held upon a fixed favourable assessment." He goes on to state that in Tinnevelly 87 kattuguttaga villages are whole inam villages and to show the different descriptions of kattuguttaga inams according to their purpose, *e.g.*, pagoda, village goddess, mosque, water pandal, math, etc., and the numbers of each type. At or towards the end of the labours of the commission Mr. Taylor's successor Mr. Blair made a final report, dated 30th October, 1869, on the entire operations and appended to it a long Glossary or descriptive list of inam tenures of the Madras Presidency. Kattugutta as the name of a tenure is described thus "lands held on a fixed rent less than the full assessment. They have been treated as jodi inams." Rokka gutta are "villages held on a fixed money rent the amount of which is somewhat lower than the standard assessment of Government lands." Jodi is said to be "an inam subject to a quit-rent." Jivitam is accounted for as a Madura term meaning tenures granted by zemindars to relatives or dependants either for subsistence or on condition of performing feudal service. Poruppu is said to mean wet or dry lands held on a favourable assessment paid in money. Bilmakta means "lands held at a fixed rent below the usual standard."

Lastly, their Lordships find that a recent case before Wallace, J., in the Madras High Court raised the present point: *Thirumalayappa* v. *Karuppayi Ammal*.[1] The question arose on the issue whether the inam village was an estate within the Madras Estates Land Act, 1908, and the suit was between tenants of

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1. A.I.R. 1928 Mad. 375.

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the village and the inamdar. The tenants relied on the description of the village as kattuguthagai and persuaded the District Judge that this implied that the inamdar was only a renter or farmer of the melvaram right from Government. Wilson's Glossary was cited by Wallace, J., who held that "kattuguthagai was in essence a lease or grant of land at a favourable rent........ there was nothing in the term itself from which one is entitled to infer that what was handed over was only the melvaram." That is the exact point now before their Lordships whose examination of the matter leads them to the same conclusion.

Without undertaking to decide what would be the effect upon the present question of proof that in 1753 cultivators with permanent rights of occupancy were upon the lands of the village and without purporting to determine whether a kattuguthagai grant could be made or was ever made in such circumstances as to take effect upon melvaram only, their Lordships are of opinion that the evidence in the present case which consists in substance of the proceedings of the inam commission is strong to show that the right of the math was a right to the land and to the whole land of the village. Indeed, it is both handsomely and sensibly conceded that this is the *prima facie* effect of the inam commission's acts and words. There is no such evidence, direct or indirect, as would justify a Court of law in cutting down the effect of the title-deed of July, 1865, or in refusing to give full effect to the statements in the inam register, Ex. A. Of the state of the village in 1753, and the motive of the grant in favour of this Mysore Hindu institution their Lordships are without information. The conditions of 1753 are not directly ascertainable and an imaginative reconstruction, if it were permissible, is rendered both difficult and valueless by the troubled character of the times. Save that the right of the math has been recognized throughout, the history of this matter is a blank from 1753 until the end of the century, when British authority succeeded that of the Nawab of Arcot. From that time there are the materials mentioned in the inam register as relating to the years 1801, 1804, 1814, 1820 and the attachment from 1816 to 1826 for "arrears of jodi". That attachment is said by learned counsel for the plaintiffs to have been made under Madras Regulation XXVII of 1802 a Regulation of which the language is taken from Bengal Regulation XIV of 1793. It provides for attachment of lands as a means for the recovery of revenue from two classes of persons whom it calls (1) actual proprietors of land, (2) farmers of land holding farms immediately from Government. The math would not seem to be a "farmer" in this sense and the plaintiffs' argument that it was treated as an "actual proprietor" may well be right; but as the entry in the inam register gives no particulars as to the authority for the attachment and as the language of Regulation XXVII may not be altogether apposite to the Madras conditions their Lordships do not further pursue this line of argument. There is no evidence showing that in later years cultivators have established permanent right in the land as against the math. It does not seem to their Lordships to be in doubt that the inam right extended to all the village lands. It was a whole village inam like many others—a "kattu-

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guthagai village"—in the olugu (or account kept of village fields) of 1801 and in the language of the case which came before the Board in 1861; a "whole kattuguthagai village" in the language of the inam register of 1864. In these circumstances it would be unreasonable to attach the smallest weight to the circumstance that the words "besides poramboke" had not been inserted into the title-deed made out in 1865 upon a form not specially adapted to the case of whole village inams.

Upon the whole, therefore, the first two of the appellant's arguments as summarised in a previous passage of this judgment do not in their Lordships' view succeed and the math must be taken to have shown title to the lands of the village as a whole. But it is necessary to give separate consideration to the contention that the inamdar's right in the lands of the village is subject to an implied reservation of the bed of the N. K. Channel in that part of its course which takes it within the western boundary of the village. It has been contended for the appellant that a reservation must also be implied as regards subsidiary channels although within the village, because they too are part of a Government irrigation system. This question is quite unaffected by the provisions of section 2, Madras Land Encroachment Act (Madras Act III of 1905), which saves the rights of inamdars. The subsidiary channels do in some cases carry water which serve to irrigate the lands of other villages so as to give them *prima facie* at least some rights as lower riparian proprietors. Even so, however, their Lordships think it quite impossible to imply any reservation of the beds or banks of these subsidiary channels, having regard to their number and distribution throughout the village and to the tanks within the village which are connected with them. So to treat them would alter fundamentally the character and value of the grant. It was pointed out in the *Urlam case*[1] that if any part of the water carried by the channels was to be specially safeguarded in the interest of some other Government village it would be enough to imply a reservation of water rights; and that a reservation of the channels would raise questions as to the liability of Government for their upkeep and possibly for their management.

There is more to be said for implying in favour of Government a reservation of the N. K. Channel itself. In these suits only a few bare facts about this channel have been given in evidence. A reference made in another case, *Ambalavana Pandara Sannathi* v. *Secretary of State,*[2] to a boundary mentioned in a grant of 1614 is the proof of this channel's antiquity. No attempt has been made to show the condition of this village or this channel in 1753. The history of the management of the channel is very sketchy if it can be said to have been attempted by either side. From certain remarks made in the judgment of Varadachariar, J., in a previous case between the present parties, *Secretary of State* v. *Narayana Aiyar,*[3] a few more facts may be

1. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 (P.C.).
2. (1905) 15 M.L.J. 251: I.L.R. 28 Mad. 539.
3. (1937) 2 M.L.J. 178.

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gathered, *e.g.*, "After flowing through a number of ayan villages and inam villages this channel at its tenth mile enters the Vagaikulam village and after flowing through that village for three-quarters of a mile it enters the Government village of Manarkoil and finally empties itself into certain ayan tanks." But at the moment their Lordships have not even the assistance of accurate or sufficiently detailed maps of this channel or proper evidence in explanation of them by a surveyor or engineer with knowledge of the locality. The ownership of this channel has been disputed between Government and the math for a number of years and the question has cropped up and narrowly escaped decision more than once—always it would seem in connexion with some small money claim thus coming before the High Court on second appeal as in this case. It was very carefully handled by Varadachariar, J., in the highly instructive judgment above mentioned. The trial Court in the present case has held that the N. K. Channel belongs to the inamdar and this has not been reversed on appeal. Their Lordships have some hesitation in the circumstances in touching that finding but as they have arrived at the conclusion that a decision of this question is not necessary to the disposal of this appeal, the matter may still be left open.

Assuming without in any way affirming that the N. K. Channel belongs to Government, their Lordships consider that this appeal of the Secretary of State should be dismissed. They think that the same principles as were applied in the *Urlam case*[1] apply upon that footing to the village of Vagaikulam. Upon this important question of principle they agree with the decisions of the Madras High Court in *Yahya Ally Saheb* v. *Secretary of State*[2] and *Sevugan Chettiar* v. *Secretary of State*,[3] which were followed by the High Court in this case. In one part of the Board's judgment in the *Urlam case*[1] Lord Parker dealt with it on the basis that the river Vamsadhara belonged to Government and that the zemindar had a grant from Government of contiguous land through which passed a channel constructed for irrigation and supplied with water from the river. He showed how when the head sluice and initial portion of a channel were situate in the zemindar's estate, the right or easement of taking water from the river is limited only by the size of the channel and the nature of the sluices and so forth. It is measured by the physical conditions of the channel (*cf. the Urlam case*[1]). In the case of Vagaikulam the channels which lead out of the N. K. Channel have open heads, but the same reasoning covers all the channels which take off from the N. K. Channel in that part of its course which is within the village. It is understood however that some water in some of the subsidiary channels is taken from the N. K. Channel at points which are near to but not within the village, and flows first, if only for a short distance, through channels in land belonging either to Government or to some other proprietor. It may be that very little water is obtained by Vagaikulam in

1. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 (P.C.).
2. (1927) 53 M.L.J. 769.
3. A.I.R. 1928 Mad. 261.

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this way since none of the Courts in India has specifically dealt with the matter upon this footing nor is it specifically raised by the appellant's case as a separate matter. But if water be so obtained by Vagaikulam village the inamdar of Vagaikulam has by virtue of his engagement with Government—that is by virtue of the title granted to him in 1753 and confirmed in 1864—rights analogous to those of a lower riparian owner on a natural stream and any rights which can be claimed as continuous and apparent easements. His position is not materially different from that of the Urlam zemindar in respect of water which came into his estate through the other zemindaries from the Vamsadhara assuming the river to belong to Government. That position is dealt with specifically in the judgment of the Board (*cf.* the *Urlam case*[1]), which need not be repeated here. The physical conditions of the channels at the village boundary would provide the measure of the water to which the math was entitled by virtue of its inam grant.

It appears therefore unnecessary to determine the proprietorship of the bed of the N. K. Channel and the only remaining question is upon the construction of Proviso 1 to section 1, Madras Irrigation Cess Act, 1865. The point taken by Mr. Tucker for the appellant is that unless it be shown that Government is obliged by means of the dam across the Tambraparni river to direct water into the N. K. Channel and obliged to direct more than is necessary to supply the "mamul wet" of 1864, the inamdar of Vagaikulam is not "entitled to irrigation" within the meaning of the proviso. In strictness of language, what the inamdar is entitled to is water and he needs no authorisation from others to use for irrigation such water as is his. In the years 1920 and 1923 or at any other time he has done no more than use the water which came into his channels, directly or not quite directly, from the N. K. Channel. As their Lordships construe the proviso, he is entitled to this irrigation without separate charge if he has a right to the water by virtue of his inam and as one of the rights covered by the jodi which it bears. In the *Urlam case*[1] it was said by the Board of the zemindari rights that they arose under and were dependent upon engagements with Government embodied in the sanads granted at the permanent settlement and that payment for them was included in the jammas. When it is said that the inamdar's or zemindar's right to water is measured by the physical conditions at the channel heads it is not of course intended that at all seasons he is entitled to a volume of water amounting to the full capacity of the channels. It is only meant that up to the measure of that capacity he is entitled to such water as can flow into them, the condition of the "river" or "upper channel" being what it is from time to time. The math's right, if any, to require that Government shall do or refrain from doing some act in order that the upper channel shall not run dry is a distinct though a closely connected matter. It seems improbable that Government should desire to put the N. K. Channel into disuse or to discontinue any practice upon which

1. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 (P.C.).

generations have relied for their subsistence, especially as it is not denied that Vagaikulam has some right to water and Manarkoil is an ayan village. Their Lordships gather that many dams in Madras even if partly made of masonry require works of one sort or another to be done at certain seasons of each year in order that they may perform their function. In the case of inam lands which from long before 1865 have had the right to obtain water from ancient Government systems of irrigation the policy and effect of proviso 1 to section 1 of Act VII of that year may be that such rights as they had should continue without separate charge. If so, it is a matter for consideration whether this can or ought to be defeated in the particular case of dams which do not function automatically and without some seasonal control. If, however, such a course of action on the part of Government is properly to be contemplated as a matter of legal right, the right can neither be affirmed nor negatived upon his appeal. The decree under appeal is really that of the District Munsiff which the other Courts in India have affirmed. It orders refund of water cess paid for the years 1920 and 1923, and it declares that Government is not entitled to levy cess "for cultivation that might be made by the plaintiffs in excess of the extents shown in the inam title-deed. . . . . with the quantity of water that has been flowing and that would flow through the present ventage of the branch channels." In their Lordships' opinion, the plaintiffs' right to this relief has been fully made out independently of the question whether the N. K. Channel belongs to the math or to Government. They have been much assisted by the clear and thorough judgment of the trial Court whose presentation of the facts and law has facilitated their task and that of the appellate Courts in India. They will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs as between solicitor and client of the legal representative of respondent 1 in the first appeal, who alone appeared.

Solicitors for Appellant: *Solicitor, India Office.*

Solicitors for Respondents: *Harold Shephard.*

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

D. A. Rathnaswamy Pillai .. *Petitioner** (*Petitioner*)

v.

Rajaratnam Pillai .. *Respondent* (*Respondent*).

Criminal Procedure Code (V of 1898), sections 476 (2), 476-B and 407—Complaint under section 211, Indian Penal Code, by a Sub-Magistrate to Sub-Divisional Magistrate—Proper procedure—Appeal under section 476-B of the Criminal Procedure Code—If can be delegated by District Magistrate to a Subordinate Magistrate.

A Sub-Magistrate on the petition of the respondent preferred a complaint under section 211, Indian Penal Code to the Sub-Divisional Magistrate who instead of taking the case on file said that he was not satisfied with the proceedings of the Sub-Magistrate and ordered him to make some further

*Crl.R.C. No. 245 of 1942 (Crl.R.P. No. 231 of 1942). 28th July, 1942.

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inquiries. About the same time the respondent took the matter in appeal under section 476-B, Criminal Procedure Code to the District Magistrate, who sent it to the Sub-Divisional Magistrate (the very officer to whom the complaint had been made) who forwarded the appeal to the Sub-Magistrate in continuation of his previous order.

Held, when once the complaint is sent to the Magistrate having jurisdiction, he must proceed under section 476 (2), Criminal Procedure Code, as if upon a complaint made under section 200. It is for the Magistrate making the complaint and not the Magistrate to whom the complaint is made to consider whether it is in the interests of justice to make a complaint.

The remedy of a person against whom a complaint is made is by way of appeal to the Court to which appeals ordinarily lie from the Court which lays the complaint.

The District Magistrate has no power to send an appeal under section 476-B, Criminal Procedure Code to the Sub-Divisional Magistrate for disposal. Only appeals under section 407 (1) may be delegated under section 407 (2) to a First Class Magistrate subordinate to him.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the District Magistrate of Trichinopoly, dated 27th February, 1942 and passed in M.C. No. 7 of 1942 (M.C. No. 51 of 1941 on the file of the Court of the Stationary Sub-Magistrate, Trichinopoly).

Lobo of *Messrs. Pais, Lobo* and *Alvares* for Petitioner.

A. V. Narayanaswami Aiyar for Respondent.

K. Venkataraghavachariar for the Public Prosecutor (*V.L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—A number of illegal and improper orders have been passed as a result of the proceedings arising out of a petition filed by the respondent requesting the Sub-Magistrate, Trichinopoly, to make a complaint under section 211, Indian Penal Code.

The Sub-Magistrate considered the petition and preferred a complaint to the Sub-Divisional Magistrate, Trichinopoly. The Sub-Divisional Magistrate, Trichinopoly, instead of taking the case on file, as he was bound to do under section 476 (2) of the Code of Criminal Procedure, said that he was not satisfied with the proceedings of the Sub-Magistrate and ordered him to make some further inquiries. About the same time, the respondent took the matter in appeal under section 476-B, Criminal Procedure Code, to the District Magistrate. Instead of disposing of the matter himself, as he should have done, the District Magistrate sent it to the Sub-Divisional Magistrate, the very officer to whom the complaint had been made. The Sub-Divisional Magistrate then committed a further illegality by forwarding the appeal to the Sub-Magistrate in continuation of his previous order. Finally, the petitioner approached the District Magistrate in revision against the order of the Sub-Divisional Magistrate contending very rightly that the Sub-Divisional Magistrate had no jurisdiction to pass the order he did. The District Magistrate had no power to interfere in revision; but he rejected it under the misapprehension that *Janardhana Rao* v. *Lakshmi Nara-*

samma [1] was an authority for the position that the Sub-Divisional Magistrate to whom the complaint was given did have the power that he purported to exercise.

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Section 476, Criminal Procedure Code, which empowers the Court to make a complaint to the nearest First Class Magistrate having jurisdiction, lays down the procedure to be adopted and says that after such preliminary inquiry, *if any,* as it thinks necessary, it shall record a finding and may make a complaint. Under section 476 (1) it is the Court which considers the question whether it shall lay a complaint or not that has to be satisfied whether it is expedient in the interests of justice that an inquiry should be made; and it gives to that Magistrate complete discretion whether to conduct the preliminary inquiry or not. When once the complaint is sent to the Magistrate having jurisdiction, he must proceed under section 476 (2), which says that such Magistrate shall thereupon proceed according to law as if upon complaint made under section 200. That it is for the Magistrate making the complaint to consider whether it is in the interests of justice to make a complaint and not the Magistrate to whom the complaint is made, is clear from the section itself, and this has been laid down in *Raja Rao* v. *King-Emperor.*[2] The person against whom a complaint is made is not without a remedy; but that remedy does not lie in the Court of the Magistrate to whom the complaint is made, but in the Court to which appeals ordinarily lie from the Court which lays the complaint. The appellate Court has then to consider the same questions as the complaining Court; and it may thereupon exercise its discretion and direct the withdrawal of the complaint or itself may make a complaint. If it thinks that further enquiry is necessary, it may order it. The ordinary appellate Court would be, in this case, that of the District Magistrate. Although the District Magistrate has power in certain cases to delegate his appellate powers to Sub-Divisional Magistrates, he had no such authority in this case. Section 407, which deals with the delegation of appellate powers, says in the first sub-section "any person convicted on a trial held by any Magistrate of the Second or Third Class . . . . . may appeal to the District Magistrate." Sub-section (2) says that appeals under sub-section (1) may be delegated by him to any Magistrate of the First Class Subordinate to him and empowered by the Local Government to hear such appeals. The appeal in this case was one under section 476-B, Criminal Procedure Code and not under section 407 (1), so that the District Magistrate in this case had no power to send the appeal to the Sub-Divisional Magistrate for disposal.

When the petitioner went in revision to the District Magistrate, the District Magistrate dismissed the revision application saying that the Full Bench decision in *Janardhana Rao* v. *Lakshminarasamma,*[1] was an authority which negatived the contention of the petitioner that under section 476 (2) the Magistrate to whom the complaint was made had no power to consider

1. (1933) 65 M.L.J. 873: I.L.R. 57 Mad. 177 (F.B.).
2. (1926) 51 M.L.J. 331: I.L.R. 50 Mad. 660.

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whether the complaint was properly made. This case merely deals with the powers of the appellate Court and not of the Court to which the complaint is made.

The petition is allowed. The order of the District Magistrate sending the appeal of the respondent to the Sub-Divisional Magistrate, the first order of the Sub-Divisional Magistrate directing the Sub-Magistrate to make further inquiry into the matter, and the second order of the Sub-Divisional Magistrate directing the Sub-Magistrate to dispose of the appeal in accordance with his previous orders, are all set aside. The District Magistrate will proceed to dispose of the appeal preferred by the respondent. The Sub-Divisional Magistrate will exercise only such powers as are given to him under section 476, Criminal Procedure Code.

K.S. ——— *Petition allowed.*

PRIVY COUNCIL.

[On Appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD THANKERTON, LORD MACMILLAN, SIR GEORGE RANKIN AND SIR CHARLES CLAUSON.

Raja Rajgan Maharaja Jagatjit Singh .. *Appellant**

v.

Raja Partab Bahadur Singh .. *Respondent.*

Maharaja Jagatjit Singh v. Raja Partab Bahadur Singh.

Specific Relief Act (I of 1877), section 42—Property in possession of receiver by order under section 145, Criminal Procedure Code—Suit for mere declaration of title—Competency—Limitation—Article 120 applicable —Limitation Act (IX of 1908), section 28—Extinction of title under— Onus of proof.

After an order under section 145 of the Criminal Procedure Code attaching and placing the disputed lands in the possession of a receiver, the parties were agreed that pending the decision of a Civil Court, the lands should remain attached and that proceedings should meantime be confined to records, the lands to be released to the party who succeeded in the civil suit; and the Magistrate ordered accordingly. In a suit by one of the parties for a declaration that he was entitled to the properties by adverse possession,

Held, that, (*i*) the suit was rightly confined to a mere declaration of title and was neither in form nor substance a suit for possession of immovable property; (*ii*) it was for the plaintiff to establish that the title to the lands in suit held by the defendant's predecessors originally had been extinguished under section 28 of the Limitation Act by the adverse possession of the plaintiff or his predecessors for the appropriate statutory period of limitation completed prior to the possession taken by the receiver who thereafter held for the true owner; (*iii*) adverse possession against an existing title must be actual and cannot be constructive; (*iv*) article 47 of the Limitation Act does not apply to the suit as there has been no order for possession by the Magistrate under section 145, Criminal Procedure Code. The suit being one for a mere declaration of title articles 142 and 144 do not apply and the suit is governed by article 120.

Appeal from a decree of the Chief Court of Oudh (Srivastava and Nanavutty, JJ.), dated 7th May, 1936, against the decree of the Additional Subordinate Judge of Kheri, dated 22nd December, 1933.

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*P.C.A. No. 50 of 1940. (O.A. No. 21 of 1936.) 28th April, 1942.

C. S. Rewcastle, S. Hyam and *Robert Ritson* for Appellant.

W. Wallach for Respondent.

Their Lordships' Judgment was delivered by

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LORD THANKERTON.—The dispute in the present appeal relates to the ownership of certain plots of land which lie on the boundary of, or between, the estates owned by the parties in the Kheri district of Oudh. The suit was instituted on 23rd January, 1933, by the Deputy Commissioner of Kheri as Manager of the Court of Wards Isanagar Estate in the Court of the Additional Subordinate Judge of Kheri against the present appellant, the Maharaja of Kapurthala. The plaintiff prayed for a declaratory decree that he was the rightful proprietor of the lands in suit. After trial, the Subordinate Judge delivered his judgment and dismissed the suit, except in respect of certain small areas of land not contested by the defendant, by decree dated 22nd December, 1933. The plaintiff appealed to the Chief Court, and, while the appeal was pending, the Isanagar Estate was released from the superintendence of the Court of Wards, and the present respondent, the Raja of Isanagar, was substituted as appellant in the Chief Court in place of the original plaintiff. By decree dated 7th May, 1936, the Chief Court set aside the decree of the Additional Subordinate Judge and decreed the suit. The present appellant appeals from the decree of the Chief Court.

The lands in suit are claimed by the respondent to form part of his villages of Debipurwa and Harisinghpur, while the appellant claims that, with the exception of the areas not contested by him, the lands in suit form part of his villages of Parsa and Binjaha, which lie on the east side of the respondent's villages. The two lists attached to the plaint set out the plots in suit list "A" consisting of 53 plots measuring 42·97 acres, claimed to form part of Debipurwa, and list "B" consisting of 193 plots measuring 247·63 acres claimed to form part of Harisinghpur. The plots in suit are shewn in red on two maps also attached to the plaint and marked "C" and "D". The total acreage in suit is thus 290·60 acres, out of which the appellant conceded that eleven small plots and portions of other plots were owned by the respondent. These concessions are shewn in two lists for each of the respondent's two villages, and the total area thus conceded is about 73 bighas out of the 464 bighas in suit, the equivalent of the 290·60 acres already mentioned; in other words, between one-sixth and one-seventh of the area of the lands in suit admittedly belong to the respondent.

There are four important stages in the history of the lands in suit, as to the facts of which there is little dispute between the parties. The first stage relates to the first regular settlement of Kheri District which was made in the year 1865, and was in fact concluded in 1867. There were then disputes between the respondent's predecessor, and Colonel Boileau, the then proprietor of Parsa and Binjaha, and predecessor of the appellant. These disputes were compromised, and the demarcation of the

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boundary was made upon the agreement of the two adjacent proprietors. It was held by both Courts below, and is agreed by the parties that by the first settlement the title of the parties' predecessors was determined, and that the boundary then demarcated established the title of the respondent's predecessor to the lands now in suit and is the boundary as now claimed by the respondent in his plaint.

The second stage relates to the second settlement of the Kheri District, which took place during the years 1896-1899. By this time the Maharaja of Kapurthala had succeeded Colonel Boileau, and disputes arose between him and the Raja of Isanagar as to the demarcation of the boundary, and two proceedings were commenced in the Court of the Deputy Collector of Kheri, one in respect of the boundary between Parsa and Debipurwa and the other in respect of the boundary between Parsa and Harisinghpur. After a report from the Amin of the Court, Mr. Habibullah, the then Deputy Collector of Kheri, by a judgment in each proceeding, dated 8th September, 1899, demarcated the boundaries on a line which varied slightly the boundary line shewn on the map submitted by the Amin. This may be conveniently referred to as the Habibullah boundary line. There is no doubt that Mr. Habibullah had no power to determine questions of title, and that, under section 23, Oudh Land Revenue Act (XVII of 1876), his duty was to determine the boundary on the basis of actual possession. Further, the land in suit in the present case is the area which lies between the boundary fixed by the first settlement, and the boundary fixed by Mr. Habibullah, which shifted the boundary westward to the advantage of the Maharaja of Kapurthala and to the disadvantage of the Raja of Isanagar. This was agreed by the parties and found by both Courts below.

The third stage relates to two proceedings before Mr. Fazl Ali in the year 1903. As Deputy Collector of Kheri, Mr. Fazl Ali gave judgment on 24th November, 1903, in an application by the Maharaja of Kapurthala against the Raja of Isanagar, for demarcation of the boundary between the plaintiff's village Parsa and the defendant's villages Harisinghpur, Debipurwa and Ram Loke, the lastnamed of which lies immediately to the south of Debipurwa. Under section 41 (1), United Provinces Revenue Act (III of 1901), all disputes regarding boundaries fell to be decided, as far as possible, on the basis of existing survey maps; but, if that were not possible, the boundaries were to be fixed on the basis of actual possession. Mr. Fazl Ali accepted the boundary line laid down by Mr. Habibullah and declined to allow fresh enquiry regarding possession or inclusion of the land on the basis of possession; he rejected the objections of the Isanagar estate and ordered the erection of boundary pillars. Almost at the same time proceedings were instituted in the Court of Mr. Fazl Ali as Deputy Magistrate of the First Class under section 145, Criminal Procedure Code, against the Raja of Isanagar and the Inspector of Kapurthala in connexion with the "boundary dispute of village Parsa, Police Station Dhaurahra." On 17th

December, 1903, Mr. Fazl Ali, as Deputy Magistrate, on an application of the same date by the parties charged, made an order in the following terms:

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"Bhagwan Din, general agent of Kapurthala and Jiwan Sahai, general agent of the Isanagar estate, presented this application and stated that there is no dispute between them; rather the Kapurthala estate has entered into possession of this land according to settlement of boundary line. It is

Ordered

That now there is no need of proceedings under section 145, Criminal Procedure Code. Therefore (the case) be consigned to records and by sending a copy of this order, the police be informed of this agreement."

The application contained the following statement:

"The petitioners beg to submit that in the abovenoted case notice has been issued from this Court regarding settlement of dispute in respect of boundary of village Parsa against the villages of the Isanagar estate situate on the boundary limit and the date of hearing has been fixed for to-day. Now the parties therein do not desire to get survey made because the case for demarcation of boundary of village Parsa belonging to Kapurthala against the villages of Isanagar situate on the boundary limit, which was pending, has already been decided by this Court on 24th November, 1903. This land regarding which the decision under section 145, Criminal Procedure Code, was sought to be is in possession of the Kapurthala estate. As mutually between the parties at this time, settlement of demarcation has been made according to possession and the boundaries have been separated, therefore submitting this application, it is prayed that this case be consigned to records."

It will be noted that the appellant's village Binjaha is not mentioned in either of these proceedings. The fourth stage is important as shewing the state of possession of the lands in suit at the date when the present suit was instituted on 26th January, 1933. In the year 1931 there were two cases—Nos. 39 and 41—under section 145, Criminal Procedure Code, in the Court of the Magistrate of the First Class at Kheri, which involved the appellant and respondent in respect of the land now in dispute. In No. 39, on 4th May, 1931, the Magistrate ordered the case to be filed as the parties had satisfied him that no breach of the peace need be apprehended. But Case No. 41 was commenced on a report by the Sub-Inspector of Police, dated 14th October, 1931, and on 24th October, 1931, at the same time as he ordered the parties to attend the Court on 26th November, the Magistrate considering the case as one of emergency, ordered the plots referred to in the report to be attached pending his decision under section 145, and appointed the Tahsildar, Tahsil Nighasan, District Kheri, as receiver. These plots appear to have been the three small plots, a suit for possession of which by the present appellant had been finally dismissed by the Chief Court by decree, dated 26th November, 1929. These three plots amounting to 1·30 acre are included in the lands presently in suit. By two orders, dated 7th November, 1931, the Magistrate ordered the Tahsildar to take possession of the plots contained in a list attached to the first of these orders, and in addition to these plots, "if you find that there are any other plots in dispute, they should also be attached or taken possession of." It is common ground that the Tahsildar, acting under these orders, took possession of the lands presently in suit on 23rd February, 1932, and that he was still

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in possession when the present suit was instituted on 26th January, 1933. As the result of applications by the parties, who were agreed that, pending the decision of a Civil Court, the lands should remain attached and that the proceedings should meantime be consigned to records, the lands to be released to the party who succeeded in the civil suit, the Magistrate made an order filing the case meantime, dated 6th April, 1932.

In the first place, their Lordships are clearly of opinion, contrary to the view of the Subordinate Judge, but in agreement with the view of the Chief Court, that it was for the appellant to establish that the title to the lands in suit held by the respondent's predecessor under the first settlement of 1865, had been extinguished under section 28, Limitation Act, by the adverse possession of the appellant or his predecessors for the appropriate statutory period of limitation, completed prior to the possession taken under attachment on 23rd February, 1932, by the Tahsildar, who thereafter held for the true owner. Their Lordships are further of opinion that the present suit, which was subsequently instituted, was rightly confined to a mere declaration of title, and was neither in form nor substance a suit for possession of immovable property.

In the second place, on the question of the errors of procedure of the Subordinate Judge in placing the burden of proving his possession within the limitation period on the respondent and ultimately refusing to allow the respondent to lead evidence in rebuttal of the appellant's evidence of adverse possession, it is enough to say that the appellant's counsel felt constrained to state that he could not defend the exclusion of evidence by the learned Judge, and that, if otherwise successful in his appeal, he should ask that the case should be remanded in order to give the respondent the opportunity which was so denied to him. The Chief Court held that the appellant had failed to prove adverse possession, and found it unnecessary to remand the case.

With regard to the statutory period of limitation, Art. 47 of the Act does not apply, as there has been no order for possession by the Magistrate under section 145, Criminal Procedure Code. As the suit is one for a declaration of title, it seems clear that articles 142 and 144 do not apply, and their Lordships agree with the Chief Court that the suit is governed by article 120. This leaves for consideration the main issue of proof of adverse possession by the appellant and his predecessors, and the appellant is at once faced by a difficulty which proved fatal to his success before the Chief Court, *viz.*, that unless he can establish adverse possession of the lands in suit as a whole, he is unable, on the evidence, to establish such possession of identified portions of the lands in suit. Before their Lordships, the appellant's counsel conceded that, in order to succeed in the appeal, he must establish adverse possession of the lands in suit as a whole. He further conceded that his case on that point rested either (*a*) on the Habibullah decision of 1899, on which he succeeded before the Subordinate Judge, or (*b*) on the compromised proceedings under section 145 in 1903. He conceded that neither the Habibullah decision nor the boundary proceedings in 1903 amounted to a judicial deci-

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sion. The appellant maintained that the Habibullah decision, given under section 23 of the Act of 1876, was good evidence of the state of possession at that time, and of the possession of the whole of the land in dispute by Kapurthala. He maintained that it must be assumed that Mr. Habibullah did his duty and that the decision was based on actual possession; under section 35, Evidence Act, it was good evidence of the fact of possession. Unfortunately for this contention it appears on the face of the judgment that possession was only proved in respect of land under cultivation, and that the boundary line laid down by Mr. Habibullah was largely an arbitrary line, and, at least to that extent, was not based on actual possession by Kapurthala, and it is well established that adverse possession against an existing title must be actual and cannot be constructive. This element in the decision may well have been largely due to the vagaries of the river, for we find, for instance, in Ex. A-19 that the total cultivated area of Parsa was reduced from 1383 acres of the first settlement to 163 acres in 1896. Mr. Harcourt Butler (afterwards Sir Harcourt Butler), Settlement Officer, remarked in this statement:

> "Nearly the whole of this village is in the belly of the river. A strip of high land remains with 3 little sites, but that is in danger."

With reference to Binjaha, Ex. A-291 shows that the cultivated area was 753 acres at the first settlement, and 44 acres in 1897. The same Settlement Officer remarks:

> "The river has cut in and completely spoiled the village since the year of survey. The assets are now inconsiderable."

Their Lordships are of opinion that, on this ground alone, the Habibullah decision does not provide the necessary foundation for the appellant's case. In 1903 Kapurthala applied for a fresh demarcation of the boundary of his village Parsa with the respondent's villages. Binjaha was not included. As already stated, Mr. Fazl Ali declined to allow fresh inquiry as to possession and ordered erection of boundary pillars on the Habibullah boundary line, and rejected Isanagar's objections, among which was an allegation that he was in possession. That decision adds nothing to the Habibullah decision. But the appellant really rests his case on the proceedings under section 145, and their compromise. The appellant submitted that the terms of the compromise as stated in the application of 17th December, 1903, and in the order of that date, constitute an admission by Isanagar of the fact of possession by Kapurthala of the whole lands now in suit, and, further, an admission of title in the sense that Isanagar is estopped from denying Kapurthala's right to possess the whole lands. It may be noted that the second of these contentions is separate from the plea of limitation based on adverse possession. Their Lordships are unable to accept either of these contentions. In the first place, there is no express admission of title, and there is no ground for the necessary implication of such an admission. In the second place, there is no sufficiently clear evidence as to the area of possession which is referred to. The land possessed is referred to in the application as "this land, regarding which the decision under section 145, Criminal Pro-

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Lord Thankerton.

cedure Code, was sought" and, in the order as "this land". That land could only be identified by the report of the police, out of which the proceedings arose, and which has not been produced. It seems that it did not refer to Binjaha, and it need not necessarily have referred to the whole of the lands in suit so far as they lie on the Parsa boundary. The appellant's attempt to derive an admission of his possession of the whole lands in suit from the 1903 compromise fails, in the opinion of their Lordships, on the terms and circumstances of the compromise, but, further, any such admission is rendered improbable by reason of certain facts which are either admitted or proved.

In the first place, by the appellant's admission in this suit, he makes no claim to adverse possession of between one-sixth and one-seventh of the lands in suit, and a large part of the remainder claimed by the appellant consists of unidentified portions of plots. Secondly, it is clear that under the decision of 26th November, 1929, the appellant cannot claim the three small plots, which were the subject of that decision, and are included among the lands presently in suit. In the third place, there is evidence which shows the serious invasion by the river of culturable lands, with serious restriction of the area of land cultivated. The Chief Court have dealt with much of this evidence, and their Lordships find it unnecessary to go into detail in the matter, but it may be noted, incidentally, that the pillars ordered to be erected by Mr. Fazl Ali in 1903, had not—at least as regards 33 of the pillars—been erected by June, 1908, "because the demarcation line lies in the middle of the river." (Exhibit 236). Their Lordships are therefore of opinion that the appellant has failed to prove adverse possession of the whole of the lands in suit, and, as he admits that he has no case for identified portions of the lands in dispute, the appeal must fail. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs in this appeal.

Solicitors for Appellant: *Borrow, Rogers & Nevill.*

Solicitors for Respondent: *T. L. Wilson & Co.*

K.S. ——— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN AND SIR MADHAVAN NAIR.

Shah Ram Chand .. *Appellant**

v.

Pandit Parbhu Dayal and others .. *Respondents.*

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Transfer of Property Act (IV of 1882), sections 60 and 82—Redemption or release of portion of mortgaged property—Effect—Other portions if can be redeemed on payment of proportionate part of mortgage money—Liability of released portion to contribute under section 82, Transfer of Property Act.

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*P. C. A. No. 90 of 1939. 20th April, 1942.
(Appeal No. 39 of 1936.)

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Where the property mortgaged belongs to, or after the mortgage becomes the property of, several persons as owners of different parts and the mortgagee releases one part or permits the owner of one part to redeem his part separately upon payment of a portion of the mortgage debt,

Held: The balance due remains charged as a whole upon all the rest of the mortgaged property and unless the mortgagee has acquired the share of a mortgagor, the other mortgagors cannot claim, independently of agreement, to have an equity to redeem their own share on payment of a proportionate part of the mortgage money. The right of redemption is a right given by section 60 of the Transfer of Property Act and not a form of relief to be given on such terms as the Court may consider equitable.

The release does not take away as regards that part the liability to contribute which section 82 of the Transfer of Property Act imposes on the different parts. *Perumal Pillai* v. *Raman Chettiar*, (1917) 33 M.L.J. 211: I.L.R. 40 Mad. 968 (F.B.), approved.

Appeal from a decision of the High Court, Allahabad in its Appellate Jurisdiction (Thom and Rachhpal Singh, JJ.), dated 15th April, 1936, affirming on first appeal a decision of the Subordinate Judge, Agra, dated 18th February, 1932.

Sir Thomas Strangman and *A. G. P. Pullan* for Appellant.

S. P. Khambatta for Respondents.

Their Lordships' Judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—This appeal is by the plaintiff in a redemption suit which was brought in the Court of the Subordinate Judge of Agra in 1924. It has reference to a village called Muthamai in the District of Agra, which at one time belonged to a zemindar called Nawal Singh. In this village the plaintiff inherited the interest of the mortgagee under a mortgage of 1893 granted by Nawal Singh to the plaintiff's grandfather: having brought a suit (No. 50 of 1911) to enforce that mortgage the plaintiff purchased Muthamai at the judicial sale in 1923 and thus became vested with the right and title which Nawal Singh had possessed in 1893. The question now raised is as to the amount which he must pay to free Muthamai from the prior charge created by a mortgage granted by Nawal Singh in 1882 over three other villages as well as Muthamai. Is it the whole sum outstanding upon the mortgage of 1882? Or is he, in the events which have happened, entitled to redeem Muthamai on payment of a part thereof, and if so how much must he pay? Both Courts in India have held that he must pay the whole sum outstanding, which is Rs. 30,000. Section 60, Transfer of Property Act (IV of 1882), is a statement of the right to redeem. It requires payment or tender of "the mortgage money" which has been defined by clause (*a*) of section 58 as "the principal money and interest of which payment is secured for the time being." Section 60 as it stood until 1929 concludes as follows:

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

Four mortgages are involved in the case—the first three being granted by Nawal Singh in his lifetime and the fourth after his widow's death by his reversionary heirs. (*a*) 6th January,

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1882: to Bast Ram and Ram Kishen: for Rs. 25,000 with interest at 6 3|4 per cent. with yearly rests: a simple mortgage of four villages—Muthamai, Phulaechi, Sherpur and Salempur. (b) 13th January, 1893: to plaintiff's grandfather Shah Bhagirath: for rupees 10,000: of two villages—Muthamai and Larhipur. (c) 24th June, 1893: to Bast Ram and Ghasi Ram, son of Ram Kishen: for Rs. 40,000 with interest at 6 per cent. with half-yearly rests: a simple mortgage of five villages—Muthamai, Phulaechi, Sherpur, Salempur and Undni. The first four of these villages had been comprised in mortgage (a) and Rs. 27,000 out of this mortgage money went to pay off mortgage (a). (d) 31st March, 1905: usufructuary mortgage: to Ghasi Ram successor of Bast Ram and Ram Kishen: for Rs. 1,03,200: of four villages—*viz.*, Muthamai, Undni, Phulaechi and Matsena. Rs. 68,097 of this mortgage money went to pay off mortgage (c). It was stipulated that Phulaechi and Matsena might be first redeemed for Rs. 43,700 and Muthamai and Undni thereafter for Rs. 59,500. In his mortgage suit of 1911 it was determined against the plaintiff that the mortgage of 1882 was extant as a charge for the original advance having priority to the plaintiff's interest in Muthamai and this is the basis of his present claim to redeem. Their Lordships will accept the plaintiff's view that the amount due thereon at 31st March, 1905, when the usufructuary mortgage was executed, was Rs. 45,967. No question of subsequent interest arises: since that date the profits of the property have been enjoyed by way of interest as provided in the usufructuary mortgage. But the plaintiff relies upon certain transactions which have since taken place with reference to that mortgage and which may now be stated.

In 1909 the successors in interest of Ghasi Ram were sued to judgment by certain creditors, and their security upon the villages Muthamai and Phulaechi under the usufructuary mortgage was in 1910 sold in execution to two persons called Panna Lal and Peare Lal (original defendants 1 and 2 to the present suit). The sale was confirmed in 1911 but no copy of the sale certificate is before the Board. The security upon the villages Undni and Matsena remained with Ghasi Ram's successors and in due course came to Madan Mohan (original defendant 4) and to a cousin of his called Bhowani Ram (original defendant 3). On the latter's death, Madan Mohan has become solely entitled. After the present suit had been filed, namely on 30th June, 1925, Madan Mohan and his cousin accepted the sum of Rs. 29,500 from one Laik Singh who had purchased in execution the interest in village Undni of the mortgagors under the usufructuary mortgage, and who desired to redeem it. Possession was given to him of this village and it was released from the mortgage. In 1924 one Ram Chand (not the plaintiff) purchased in execution the mortgagors' rights in Phulaechi and Matsena and in 1925 he applied for redemption of these villages under section 83, Transfer of Property Act, against both sets of mortgagees. By their consent he obtained possession of these two villages and their release from the usufructuary mortgage upon payment of Rs. 21,500 to Panna Lal and Peare Lal and Rs. 22,200 to Madan Mohan and his cousin. Thus of the principal sum due upon the usufructuary mortgage—*viz.*, Rs. 1,03,200

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—sums appropriated to the release of three villages other than Muthamai were paid to the amount of Rs. 73,200. Rs. 30,000 is the amount outstanding and is in respect of principal alone. There having been no appropriation of any payment to the original advance of 1882 or in relief of Muthamai, the High Court held that as the sum of Rs. 45,967 which in 1905 was due upon the mortgage of 1882 could have been realised out of village Muthamai any lesser sum now outstanding must be paid by the plaintiff in order to redeem that village.

The plaintiff does not dispute that the figure of Rs. 30,000 would be correct upon the footing that he must pay the total amount outstanding in respect of the advance of 1882. But he claims to redeem Muthamai upon payment of a proportionate part of the amount (Rs. 45,967) due in 1905 in respect of that advance. He says that the total annual value of the four villages mortgaged in 1882 was at that time Rs. 3,418, of which that of Muthamai was Rs. 577, and that Muthamai's proportion of Rs. 45,967 is only Rs. 8,025. He has previously admitted liability for Rs. 12,894 and is willing to be bound by his admission, but he defends himself from being required to pay more by contending that this sum is too much. The particular facts upon which he claims to redeem Muthamai upon payment of a proportionate part of the advance of 1882 are thus set out in the third reason given at the end of his case before the Board:

"Because the integrity of the mortgage has been broken by the mortgagees themselves, firstly, by dividing the liability of the several villages in the mortgage of 1905, secondly, by dividing possession of the villages in 1911, and lastly, by allowing separate redemption of three out of the four villages."

The first of these grounds their Lordships understand to refer to the provision in the usufructuary mortgage that two of the villages might be first redeemed for a specific sum and the other two redeemed for the balance later on. The second refers apparently to the execution sale of 1910-11. The Bench which certified that the plaintiff's case was fit to be taken on appeal to His Majesty in Council understood his claim to be based on the fact that redemption had already been permitted of part of the property which was the subject of the mortgage of 1882. The mortgage of 1882 cannot be split up by reason of anything done under the mortgage of 1905 to villages which were not comprised in the former mortgage. But this ground of claim applies clearly to the village of Phulaechi and the villages of Sherpur and Salempur need not be separately discussed. The provision in the usufructuary mortgage that two villages might be first redeemed for a specific part of the new debt affords of itself no reason why the plaintiff should be allowed to redeem the mortgage of 1882 piecemeal. He is not redeeming the usufructuary mortgage nor fulfilling its conditions. It left untouched his right to redeem the mortgage of 1882 by paying off the loan of 1882. Nor does the execution sale in 1910-11 of the mortgagees' interests in Muthamai and Phulaechi provide any such reason. If *A* owes *B* Rs. 1,000 on the security of two villages X and Y and in execution of a judgment against *B* the security of *B* in one of the two villages is sold to *C*, the respective rights of *B* and of *C* as against each

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other are by no means clear. But the plaintiff had no concern with any such difficulty: at worst he had only to deal with two sets of persons instead of one as mortgagees under the deed of 1882. It affords no reason why he should not be required to redeem the mortgage as a whole.

As the first advance was included in the sum for which the mortgage of 1905 was taken, the release of Phulaechi in 1925 from the whole debt Rs. 1,03,200, released it from all claim in respect of that part which represented the advance of 1882. It does not appear that the sums paid for the release of this village and of Matsena represented exactly their proportion of the mortgage debt, though there is no reason to doubt that they were the result of a genuine bargain between the parties. It may be assumed that in 1925 all parties concerned knew of the plaintiff's interest in Muthamai. What, then, is the effect of this transaction? Where the property mortgaged belongs to, or after the mortgage becomes the property of, several persons as owners of different parts, the decisions in India have not been uniform as to the effect of a release of one part by the mortgagee or of his having permitted the owner of one part to redeem his part separately upon payment of a portion of the mortgage debt. It is not doubted that where several properties are comprised in one mortgage each is liable as between mortgagor and mortgagee for the whole of the debt: nor that as between co-mortgagors or persons claiming under the mortgagor if they have separate rights of ownership in different parts, such parts are liable to contribute rateably to the debt. But a view has been taken which found expression in the third and subsequent editions of the well-known work of Sir Rashbehary Ghose on the Law of Mortgage in India (*cf.* 3rd Edn., 1902 at page 380: 5th Edn., 1922 at pages 336-337) as follows:

> "The general rule on the subject is that the rights of persons who have acquired an interest in the mortgaged estate since the making of the mortgage, of which the mortgagee has notice, cannot be defeated or impaired by any subsequent arrangement to which they are not parties. If therefore a mortgagee with notice that the equity of redemption on a part of the mortgaged property has been conveyed, releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage debt as against such purchaser."

Decisions have carried this principle further: holding that the effect of the release of a part by the mortgagee is to allow the owner of any other part to redeem by payment of a part of the debt proportionate to the value which his part bears to the total value of the mortgaged property. It is said that the mortgagee has no right to diminish his own security and at the same time require any co-owner to pay more than his share since the latter's right to contribution has been impaired by the release. This seems to be the result of such Calcutta cases as *Imam Ali* v. *Baij Nath Ram Sahu*,[1] *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee*[2] and *Pranballabh Shaha* v. *Bhagabhanchandra Seal*.[3] The view taken in Calcutta is not without support in certain other

1. (1906) I.L.R. 33 Cal. 613.
2. (1911) 15 C.W.N. 800.
3. (1934) I.L.R. 61 Cal. 894.

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High Courts: cf. *Krishna Aiyar* v. *Muthukumaraswamiya Pillai*,[1] *Ponnusami Mudaliar* v. *Srinivasa Naickan*,[2] *Budhmal Kevalchand* v. *Rama Yesu*[3] and *Mayashankar* v. *Burjorji*.[4] It has also been considered that where the mortgagee has allowed the owner of one part of the mortgaged property to redeem his part, the result is that any separate owner of a portion of what remains can redeem his part on payment of its proportion of the debt. It is said that there has been a severance of the interest of the mortgagors with the consent of the mortgagee (Ghose: Law of Mortgage in India, 5th Edn., 1922, p. 262). In Allahabad this doctrine has been rejected and it has been held since, *Lachmi Narain* v. *Muhammad Yusuf*,[5] that if the mortgagee allows one part to be redeemed, the balance due remains charged as a whole upon all the rest of the mortgaged property.

In 1914, doubt was thrown upon the correctness of the principles which had been thought to entitle each owner of a separate part of the mortgaged property to redeem his part on payment of a proportionate amount. Napier, J., in *Venkatasubba Reddi* v. *Bagiammal*,[6] held that the previous release of one part had no such effect. He doubted whether such release impaired the right of contribution which existed between persons interested in the equity of redemption and pointed out that the matter is in India governed by a statutory Code. He recalled the observations of the Board in the judgment delivered by Lord Davey in *Webb* v. *Macpherson*,[7] at page 245, upon the difference between the statutory charge given to a vendor by section 55, sub-section (4), T. P. Act, for the unpaid purchase money and the vendor's lien given by Courts of Equity. "That lien was a creation of the Court of Equity and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge."

In 1917 the question of the effect upon the right of redemption of a previous release of part of the mortgaged property was referred to a Full Bench of the Madras High Court in *Perumal Pillai* v. *Raman Chettiar*.[8] The Full Bench considered that the right of redemption is not in India a form of relief to be given on such terms as the Court may consider equitable, but a right given by section 60, T. P. Act, upon terms therein stated; that the liability to contribute imposed by section 82 upon the various properties is not affected by the mortgagee's release of one (as indeed had been held in *Jugal Kishore Sahu* v. *Kedar Nath*[9]), and that it would be contrary to a true construction of the Act to introduce other exceptions into the last clause of section 60

1. (1906) I.L.R. 29 Mad. 217.
2. (1908) I.L.R. 31 Mad. 333.
3. (1920) I.L.R. 44 Bom. 223.
4. (1926) 27 Bom.L.R. 1449.
5. (1895) I.L.R. 17 All. 63.
6. (1916) 29 M.L.J. 319: I.L.R. 39 Mad. 419.
7. (1904) 13 M.L.J. 389: L.R. 30 I.A. 238: I.L.R. 31 Cal. 57 (P.C.).
8. (1917) 33 M.L.J. 211: I.L.R. 40 Mad. 968 (F.B.).
9. (1912) I.L.R. 34 All. 606.

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in addition to the one there mentioned. When in 1929 the Act was revised and somewhat extensively amended, a new section—section 92—gave formal expression to the right of subrogation, and the right of contribution was more plainly defined by amendments made to section 82. The state of the decisions on the present subject did not pass without attention. The word "only" was inserted after the word "except" in the concluding clause of section 60—an amendment which in their Lordships' view was intended to confirm the view taken of the clause by the Full Bench of the Madras High Court. It would have been a curious amendment to make with any other object.

The present case has to be decided upon the law as it stood before the amending Act (XX of 1929) and their Lordships agree with the reasoning of the judgment of Wallis, C.J., delivered on behalf of the Full Bench. They consider that the learned Judges in that case made the right approach to the matter by regarding the rights of redemption and subrogation as rights conferred and defined by the Act. It would indeed be unfortunate if the right of contribution which exists as between mortgagors or persons claiming under the mortgagor were found to have been inadequately expressed in the statute. That right arises to them *inter see* because they cannot require the mortgagee to have recourse to their several properties equally or rateably, the whole debt being charged on every part of the mortgaged property. But it may be doubted whether it gives rise to any equity in them which takes away the right of a mortgagee to diminish his own security except upon condition of abating part of the debt—to say nothing of the more stringent penalty of exposing himself to piecemeal redemption. It is not a very plain requirement of good conscience that the right of the mortgagee should give way to the rights of contribution between persons who have taken interests which are subject to the mortgage. However that may be, the first question is whether the release of part of the property by the mortgagee does take away as regards that part the liability to contribute which section 82 imposes upon the different parts. Their Lordships agree with the Full Bench of the High Court of Madras that this proposition is not substantiated and that a basis for the alleged equity is not made out upon the face of the Act. Again, where redemption has previously been permitted of a part of the mortgaged property on payment of a proportionate amount of the debt, it is difficult to find in that fact sufficient reason why the whole of the balance of the debt should not remain charged upon each and every portion of the remainder of the mortgaged property. Apart from any question of the policy of discouraging mortgagees from permitting one owner to redeem his own part separately, that the mortgagee's rights under the registered instrument of mortgage against other owners or parts of the property should be fundamentally altered by such permission is not justified or explained by saying that he has recognised or assented to a severance. He has not *eo ipso* assented to a severance of his rights as mortgagee against the others, nor made any bargain with them varying the terms of the registered mortgage.

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But, in the end, the question is whether section 60 of the Act provides any rule upon such matters. That section as its language shows is to be regarded as conferring the right to redeem; and while the opening words of the last clause "nothing in this section" do not prevent a wider right of redemption being given by agreement, express or implied, the mortgagor in the absence of such a stipulation must, in their Lordships' view, redeem upon the terms of the Act. It is contended for the plaintiff-appellant by Sir Thomas Strangman that the Act provides the mortgagee with a shield against partial redemption, but that if he has released part of the property from his security or has previously permitted a part to be separately redeemed, he has thrown away the shield. This certainly deserves the most careful consideration—all the more that, if right, it is equally valid under the section as amended in 1929. But has the mortgagee thrown away the shield if he has made no agreement? The single exception mentioned—the case of his having acquired in whole or in part the share of a mortgagor—shows that subsequent transactions by him as to parts of the property are within the contemplation of the clause. Indeed, part of the argument for piecemeal redemption is that a release of a portion of the land is equivalent to a purchase by the mortgagee. But the exception is made in the latter case, not on the footing that it is unjust that the full burden of the security should be imposed on the other parts of the property, but because their claim to contribution has now become a claim against the mortgagee or his interest in the equity of redemption. Circuity of action is thought to be avoided if partial redemption be permitted. This principle is stated by Sir James Colvile in *Nawab Azimut Ali* v. *Jowahir Singh*[1] to have been affirmed by the Sudder Court at Agra in a previous case, and as it had gained acceptance the statute of 1882 recognised it as an exception to the general rule that no one is entitled to redeem a part of the mortgaged property on payment of a proportionate amount of the total debt. In 1894 Edge, C.J. and Banerji, J., in a case already cited, *Lachmi Narain* v. *Muhammad Yusuf*[2] said:

> "The rule as to the redemption of a portion of mortgaged property on payment of a proportion of the mortgage debt which has been acted on in these provinces since the passing of Act IV of 1882 is to be deduced from the last paragraph of section 60 of that Act. We may say that before the passing of Act IV of 1882, the principle to be deduced from the last paragraph of section 60, to which we have referred, was the principle, so far as we are aware, which was applied in these provinces, and the right to redeem adversely a portion of the mortgaged property by payment of a proportionate part of the mortgage debt was, when not stipulated for in the contract, confined to cases in which the mortgagee or mortgagees had acquired, in whole or in part, the share of a mortgagor."

That this statement of the law as recognized in 1882 might with equal truth have been made with reference to Bengal would appear from Edn. 1 of Sir Rashbehary Ghose's book already mentioned which was published in 1877, being the Tagore Lectures for 1875-6;

> "To the general rule, however, that a mortgage must be redeemed entirely or not at all, there is one exception, and that is where the equity of

1. (1870) 13 Moo.I.A. 404, 407 (P.C.).
2. (1895) I.L.R. 17 All. 63, 65.

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redemption in a portion of the mortgaged property becomes vested in the mortgagee himself'' (p. 196).

That no other exception could claim to be established by decisions may be seen also from Macpherson's "Law of Mortgage in Bengal and the North-West Provinces," Edn. 5, 1868, pp. 110-4; Edn. 6, 1877, pp. 143-7. It is not unreasonable to suppose that in 1882 the Legislature and its draftsmen were aware of the rule of law obtaining in these provinces and aware also of the existence of some opinion in favour of a wider right of redemption: cf. *Marana Ammana* v. *Pendyala*.[1] The Act gave to the mortgagor a right to redeem each mortgage separately so that in the absence of an agreement to that effect mortgagees cannot consolidate several mortgages so as to require them all to be redeemed together. Their Lordships consider that the extent of the right to redeem was intended to be delimited by the Act which aimed at furnishing to Indian Courts a definite rule expressive of existing law; and that apart from the exception which it recognizes, the last clause of section 60 was intended to preclude mortgagors or persons deriving title from them from claiming independently of agreement to have an equity to redeem their own share on payment of a proportionate part of "the mortgage money." The High Court, in their Lordships' view, have rightly dismissed the plaintiff's appeal in this case on the ground that "under section 60, T. P. Act, the integrity of a mortgage is not broken except where the mortgagee has purchased or otherwise acquired as proprietor a certain portion of the property mortgaged. . . . In the present case no part of the mortgaged property has been acquired by the mortgagees or their successors." This appears to cover all the contentions that have been urged for the plaintiff or are open to him on the facts of the case. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the respondents' costs.

Solicitors for Appellant: *Douglas Grant & Dold.*

Solicitors for Respondents: *T. L. Wilson & Co.*

K. S. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Doctor Manavala Ayyar .. *Appellant** (*6th Deft.*)

v.

Muhammad Yoosaf Maracair (since deceased) and others .. *Respondents* (*Plff. & Defts.*).

Manavala Ayyar v. Muhammad Yoosaf Maracair.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 8 (2) *and* 10 (2) (i)—*Mortgagee in possession—Mortgage-deed providing for appropriation of income by mortgagee without liability to account in* lieu *of interest—Provision for payment of Rs.* 250 *in addition annually till redemption—Mortgage not protected by section* 10—*Provisions of section* 8 (2) *inapplicable.*

Section 10 (2) (*i*) of Madras Act IV of 1938 does not require that the rate of interest per cent. should be specified in the instrument of mortgage. Where the deed provides not only that the income of the mortgaged

1. (1881) I.L.R. 3 Mad. 230.

*Appeal No. 291 of 1938. 7th July, 1942.

properties was to be taken by the mortgagee in possession in *lieu* of interest without any liability to account but that the mortgagor should in addition pay annually a certain sum till redemption, the amount cannot be regarded as anything but interest on the principal money.

The appropriations by the mortgagee in terms of the bond in such a case cannot however be deemed to be constructive payments by the mortgagor for purposes of section 8 (2).

Jagannadha Aiyangar v. *Senniveera Chettiar*, (1941) 1 M.L.J. 197, approved.

Mylan v. *Annavi Madan*, (1905) 16 M.L.J. 99: I.L.R. 29 Mad. 234, distinguished.

Commissioner of Income-tax, Bombay Presidency v. *Bombay Trust Corporation, Ltd.*, (1929) 58 M.L.J. 197: L.R. 57 I.A. 49: I.L.R. 54 Bom. 216 (P.C.), referred to.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore, dated 26th July, 1938 and passed in O.S. No. 123 of 1937.

B. Sitarama Rao and *A. K. Sriraman* for Appellant.

M. Krishna Bharathi, T. R. Srinivasa Aiyar, N. T. Shamanna and *B. S. Narasimham* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—This appeal arises out of a suit brought in the Court of the Subordinate Judge at Coimbatore to redeem what was claimed to be a mortgage by conditional sale. A preliminary decree for redemption having been passed in favour of the 1st respondent, this appeal has been preferred by the 6th defendant.

The transaction as to the nature of which there was some dispute in the Court below was embodied in three documents, Exs. I, A and B, all executed on the same date, *viz.*, 19th September, 1905. Ex. I purports to be a sale by the 1st respondent of item 1 of the plaint schedule for Rs. 15,000 to one Giria Chetty now represented by respondents 2 to 6 (hereinafter referred to as mortgagees), and Ex. A purports to be an agreement to reconvey the property for the same sum to the 1st respondent after five and within ten years from that date, with a provision that if a reconveyance was claimed after the expiry of that period, an additional sum of Rs. 250 was to be paid for every subsequent year. Ex. B is a security bond between the same parties, and though it relates to items 2-a and 2-b of the plaint schedule, it contains several provisions governing item 1 as well. It provides that if the income received from all these items in any year within the first ten years was less than the amount of annual interest on Rs. 15,000 calculated at twelve annas per cent. per annum, the deficit should be paid by the 1st respondent and be a charge on items 2-a and 2-b. For this purpose an account of such income was to be sent to the 1st respondent every year during that period. After the period of ten years, the receipts from the properties were to be taken in lieu of interest and the 1st respondent was to pay an additional sum of Rs. 250 every year so long as the principal sum remained unpaid. All the items were placed in the possession of the mortgagee and have admittedly been in the enjoyment of his family. There can be little doubt that Exs. I and A, read in the light of Ex. B, created a mortgage by conditional sale, and the finding of the learned Subordinate Judge to

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that effect has not been questioned before us by the appellant's learned counsel Mr. Sitarama Rao.

The main question argued in the appeal related to the determination of the amount properly payable by the 1st respondent (who is an agriculturist) as scaled down under the Madras Agriculturists' Relief Act. It may be mentioned here that the account of the income of the mortgaged properties sent every year during the period of the first ten years as provided in Ex. B was accepted by the 1st respondent, and as a result of these periodical settlements, various amounts have been found to be payable to the mortgagees as deficit interest, as the annual income during that period was less than the interest stipulated. There can be no doubt that these arrears of interest have to be wiped out under the provisions of the Act. The 1st respondent, however, claimed that the whole debt should be deemed to have been discharged under section 8 (2) of the Act as the mortgagees had received in all more than twice the amount of the principal by way of income derived from the mortgaged properties in their possession. For the purpose of giving effect to this contention the learned Subordinate Judge directed an account to be taken of the rents and profits of the mortgaged properties up to the date of the decree. No objection was apparently taken in the Court below to the scaling down of the debt in this manner, and no question was raised as regards the applicability of section 8 (2) to the facts of this case.

In the appeal, however, Mr. Sitarama Rao has contended before us that the provisions of section 8 are rendered inapplicable to the present case by section 10 (2) (*i*) as the suit mortgage, so far as it relates to the period subsequent to 1915, is one where no rate of interest can be said to be stipulated as due to the mortgagee, and, secondly that even if section 10 (2) (*i*) does not cover the case, the income received by the mortgagees after 1915 in respect of which they are not accountable to the mortgagor under the terms of the mortgage, cannot be said to have been "paid" to the creditor within the meaning of section 8 (2), no payment having in fact been made by the 1st respondent.

As regards the first contention we are unable to agree that there is no rate of interest stipulated in the suit mortgage even as regards the period subsequent to 1915. As observed already the mortgage provides during this period not only that the mortgagee was to take the income of the mortgaged properties in *lieu* of interest but also that the mortgagor should pay in addition a sum of Rs. 250 every year till redemption. This sum cannot be regarded as anything but interest on the principal money, and the rate per cent. is ascertainable by a simple arithmetical calculation. The section does not require that the rate *per cent.* should be specified in the instrument of mortgage.

Turning to the second contention, direct authority in support of it is to be found in *Jagannatha Aiyangar v. Senniveera Chettiar*,[1] decided by one of us, but as the decision is not binding

1. (1941) 1 M.L.J. 197.

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on this Bench, we have heard full arguments on the point, and we see no reason to depart from the view expressed therein. It was urged by Mr. Srinivasa Aiyar for the 1st respondent that the mortgagees having been placed in possession of the mortgaged properties and asked to appropriate during the period in question the rents and profits in *lieu* of interest on the mortgage money, such appropriation by them must be regarded as payment made on account of the mortgagor for the purposes of section 8 (2) of the Act. It may be that a payment need not always involve the actual passing of money or money's worth from one hand to another, and may be made by settlement of account or adjustment of mutual claims between the parties. A constructive payment of that kind, however, involves an agreement between the parties which results in the satisfaction of some subsisting claim or demand. But where, as here during the later period, there can be no question of any claim or demand for interest by the mortgagee who is, under the bond, to take the income of the mortgaged properties in *lieu* of interest without any liability to account, it is difficult to see how the appropriation by the mortgagee in terms of the bond can be said to be a constructive payment by the mortgagor. No settlement of account or adjustment of claims is involved, and no constructive payment can, it seems to us, be imported, in such cases. The decision of this Court in *Mylan* v. *Annavi Madan*[1] relied on by Mr. Srinivasa Aiyar is distinguishable on the facts and can have no application here. The promissory note on which the suit was brought in that case provided for payment of interest in money, but the creditor was placed in possession of certain land under an agreement that he should take the produce as interest. A question of limitation having been raised it was held that there was a payment of interest as such, sufficient to satisfy the requirements of section 20 of the Limitation Act. It will be seen that the arrangement between the parties created an agency coupled with an interest as regards the receipt of the produce, and its adjustment in satisfaction of the claim for interest under the promissory note was regarded as a constructive payment of such interest. When, however, a mortgagee holds possession of the mortgaged property under an agreement that he should take the receipts from such property in *lieu* of interest, there can be no question of agency or of settlement of claim for interest and no constructive payment by the mortgagor can be implied in such circumstances. We are therefore of opinion that the decision in *Mylan* v. *Annavi Madan*[1] does not assist the 1st respondent. On the other hand, the analogy afforded by section 20 of the Limitation Act, so far as it goes, supports the contention of the appellant. Sub-section (2) of that section, which enacts that where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land *shall be deemed* to be a payment for the purpose of sub-section (1), implies that, but for such express enactment, such receipt cannot be regarded as a payment. Cf., *Com-*

1. (1905) 16 M.L.J. 99: I.L.R. 29 Mad. 234.

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missioner of Income-tax, Bombay Presidency v. *Bombay Trust Corporation, Ltd.*[1]

It was said that, in this view, the provisions of section 10 (2) (*i*) would become otiose and that, therefore, section 8 (2) should be understood as affording relief to a mortgagor even where the mortgagee has received the rents and profits of the property mortgaged without any liability to account for any part of the same, provided the case does not strictly fall within section 10 (2) (*i*). We see no force in this argument. Section 10 (2) (*i*) may well have been enacted merely to make the intention of the Legislature clear that the rent or produce received by a mortgagee in possession should not be regarded as interest paid by the mortgagor for the purpose of scaling down debts as provided in the Act. Our conclusion accords with and gives effect to this intention. On the other hand, it will, in our view, be illogical and anomalous to hold that, while the rent or produce received by a mortgagee in possession who has not stipulated for any rate of interest is protected, such protection is withdrawn where he is to take the rent and profits in *lieu* of interest and receive, as in this case, a fixed annual sum from the mortgagor as well. To both cases alike the provisions of section 76 (*h*) of the Transfer of Property Act to which reference was made in the course of the argument are inapplicable. We are therefore of opinion that the rents and profits received by the mortgagees from 1915 onwards, when they were under no liability to account to the mortgagor for any part thereof, should not be taken into account as payments received from the 1st respondent in applying section 8 (2) of the Act. Whether the rents and profits received by the mortgagees during the earlier period, *i.e.*, from the date of the mortgage up to 1915 can, in view of the different terms of Ex. B applicable to that period, be regarded as "paid" to the mortgagees within the meaning of section 8 (2) it is unnecessary to decide, as the 1st respondent did not invoke the method of scaling down indicated in that provision if the receipts during the subsequent period were to be excluded from the computation.

Mr. Sitarama Rao also raised a subsidiary point regarding the priority allowed by the lower Court in respect of the claim of the 7th respondent who obtained a usufructuary mortgage of items 2-a and 2-b under Ex. XVIII in October, 1918, from the original mortgagee. The appellant purported to purchase item 1 from him in 1930. Mr. Sitarama Rao argued that Ex. B charged items 2-a and 2-b only with the payment of deficit interest and did not create a mortgage on these properties in respect of the principal money advanced, and that, therefore, the 7th respondent could not claim any priority in respect of the principal amount which the mortgagor has been directed to deposit as a condition of redemption. This argument proceeds on a misconstruction of Ex. B. Clause (2) of Ex. B provides that the annual income derived not only from item 1 but also from items 2-a and 2-b should be appropriated by the mortgagee towards the

1. (1929) 58 M.L.J. 197: L.R. 57 I.A. 49: I.L.R. 54 Bom. 216 at 223 (P.C.).

interest and clause (6) provides that the mortgagee shall retain possession of items 2-a and 2-b also so long as the principal sum of Rs. 15,000 remains unpaid and shall deliver possession of them only on payment of that sum by the mortgagor. These provisions in Ex. B clearly show that the document created a usufructuary mortgage of items 2-a and 2-b in respect of the whole mortgage money and not merely a charge on these items for deficit interest. In this view the 7th respondent as sub-mortgagee is clearly entitled to be paid the amount due to him under his sub-mortgage in priority to the claim of the appellant who can only be regarded as a subsequent assignee of the mortgage right.

In the result, the appeal is allowed as against the 1st respondent, the decree of the lower Court will be set aside and a fresh decree will be made for redemption on payment by the 1st respondent within three months from this date the sum of Rs. 15,000 with interest at Rs. 250 per annum from 1st October, 1937, till the date fixed for payment and thereafter at six per cent. per annum. The respondents other than respondents 2 to 9 will pay the costs of the appellant here and in the Court below and bear their own. The appeal is dismissed with costs as against the 7th respondent.

Appeal allowed against 1st respondent.

K.C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Appellate Jurisdiction.*]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

Sri La Sri Subramania Pandarasannadhi, the managing trustee of Sri Vedaraneeswaraswami temple at Vedaranyam and Sri Subramanyaswami temple at Ettugudi .. *Appellant** (*Plaintiff*)

v.

The Hindu Religious Endowments Board, Madras .. *Respondent* (*Defendant*).

Subramania Pandarasannadhi v. H. R. E. Board, Madras.

Madras Hindu Religious Endowments Act (II of 1927), section 65-A (1) and Chapter VI-A—Notice to managing trustee and commissioner—Sufficiency—Order of Board superseding trustee and framing scheme—When can be set aside.

Where the notice under section 65-A (1) of the Madras Hindu Religious Endowments Act was served on the managing trustee of a temple who had charge of all its endowments, and also on the commissioner who was an inspecting and supervising officer in relation to the temple and it was contended that the notice was defective as it was not served on the *Athinathars* who appointed the managing trustee,

Held, that the notice served on the managing trustee and the commissioner was sufficient.

Where most of the grounds of complaint against the management are well founded the mere fact that the managing trustee is not responsible for some of the defects is no ground for the Board not taking action under Chapter VI-A; and the Court will not interfere with the order of the Board removing the trustee and framing a scheme unless it is shown to be perverse.

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*O.S.A. No. 1 of 1942. 25th February, 1942.

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Deivasikamani Ponnambala Desikar v. *The Board of Commissioners for H.R.E., Madras*, (1941) 2 M.L.J. 175: I.L.R. (1941) Mad. 807, referred to.

Where in respect of a notification under section 65-A (1) of the Act the managing trustee is given an opportunity to file objections but he fails to do so, the Court may refuse to allow the objections to be raised in the suit filed by him to get rid of the order.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Chandrasekhara Ayyar, dated the 19th November, 1941 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 190 of 1939.

T. V. Muthukrishna Aiyar and *R. Sundaralingam* for Appellant.

N. Rajagopala Aiyangar and *M. Seshachalapathi* for Respondent.

The Judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—In exercise of the powers conferred by sub-section (3) of section 65-A of the Madras Hindu Religious Endowments Act, 1926, the Government of Madras, by a notification, dated the 9th August, 1939, directed that the Sri Subramanyaswami temple, Ettugudi, which is in the Tanjore District, and the endowments belonging thereto should be subject to the provisions of Ch. VI-A of the Act. This notification meant that the management of the temple was to be taken out of the hands of the appellant, who was the managing trustee, and placed in the hands of an executive officer appointed by the Madras Hindu Religious Endowments Board.

In Appeals Nos. 222 and 241 of 1920 this Court settled a scheme for the management of the temple. The appeals arose out of O.S. No. 7 of 1913 of the Court of the Temporary Subordinate Judge of Tanjore. On the 30th August, 1939, the appellant filed on the Original Side of this Court the suit which has given rise to the present appeal. He asked for a declaration that the proceedings taken by the Board for the notification of the temple under Chapter VI-A are "illegal, void, without jurisdiction, not judicial but arbitrary and therefore not legally binding" on him or the temple. The suit was tried by Chandrasekhara Ayyar, J., who held that the appellant had not made out a case for the declaration.

Before us the appellant has challenged the validity of the notification on two grounds. In the first place he says that when the Board issued notice under sub-section (1) of section 65-A it did not cause it to be served on all the necessary parties to the proceedings. In the second place he contends that the order of the Board on which the notification is based was arbitrary and fell within the decision of this Court in *Deivasikamani Ponnambala Desikar* v. *The Board of Commissioners for H.R.E., Madras.*[1]

Sub-section (1) of section 65-A states that the Board may by notice published in the prescribed manner call upon the trustee and all other persons having interest in a temple or in any specific endowment attached to a temple to show cause why the temple or the endowment should not be notified to be subject to

1. (1941) 2 M.L.J. 175: I.L.R. (1941) Mad. 807.

Subramania Pandara-sannadhi v. H. R. E. Board, Madras.

Leach, C. J.

the provisions of Chapter VI-A. Rule II of the rules made by the Madras Government under sections 48 and 65-A of the Act states that the notice referred to in clause (*a*) of the sub-section (1) of section 65-A shall be sent by registered post (*a*) to the trustee of the temple or specific endowment concerned, (*b*) to such persons having interest in the temple or the specific endowment as the Board may deem necessary, and (*c*) in case the temple is, or the specific endowment is attached to, a non-excepted temple, also to the President of the temple committee, if any, having jurisdiction.

This temple is an excepted temple and at all times material to the suit the appellant was its managing trustee. It is devoted to the worship of Sri Subramanyaswami. At Vedaranyam, a village some four miles away, is a temple devoted to the worship of Sri Vetharaneeswaraswami, and there is close connection between the two temples. A scheme for the management of the Vedaranyam temple was settled by this Court in Appeals Nos. 121 and 122 of 1919 arising out of O.S. No. 6 of 1913 of the Court of the Temporary Subordinate Judge of Tanjore. At Varani in the District of Jaffna, Ceylon, is a school of *pandarasannadhis*, and the Vedaranyam temple is said to have been founded by a member of this body. In the scheme framed by the Court the trusteeship of the Vedaranyam temple is vested in Varani Athinathars, but the administration of the temple and its affairs is vested in a managing trustee who is appointed by the Athinathars. Under the authority conferred upon them by the scheme they appointed the appellant the managing trustee of the Vedaranyam temple. The scheme for the management of the Ettugudi temple and its endowments provides that the managing trustee and the commissioner of the Vedaranyam temple shall be the managing trustee and the commissioner of the Ettugudi temple respectively. The functions of the commissioner are largely those of an inspecting and supervising officer. The Ettugudi scheme also provides that all suits and other legal proceedings by or against the temple shall be instituted by the managing trustee. The Athinathars are not referred to in this scheme.

In these circumstances the Board caused notice under sub-section (1) of section 65-A to be served on the appellant as the managing trustee and on the commissioner. It is said that this was not sufficient and that it should have been served on every individual member of the body of *pandarasannadhis* in Jaffna, and as this had not taken place all proceedings under Chapter VI-A are void. The contention of the appellant is one which has no substance in it. The persons who were responsible for the management of the temple and had charge of all its endowments were served, and under the rules this was sufficient. The rule merely requires the trustee to be served and the trustee was served. Whether other persons interested in the temple should be served is for the Board and the Board alone to decide. The Board acted in accordance with law in directing notice to issue merely to the appellant and to the commissioner, and the notice to them was sufficient.

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The second contention advanced on behalf of the appellant is also without substance. In the notice served on the appellant he was called upon to appear before the Board on the 2nd May, 1939, to show cause. On that date, on his application time for the filing of objections was extended to the 16th May. They had not been filed by the 16th May and the Board was requested to give a further extension of time. It did so and allowed the appellant until the 6th July for this purpose. This was an indulgence and the appellant could not legitimately expect any further extension. The objections had not been filed by the 6th July, but on that date an advocate on behalf of the appellant applied for further time. The Board refused to grant it and very properly so too. The appellant had been given far more time than was necessary. In these circumstances the Board proceeded to consider the position and ordered the notification to issue.

In the notice which the Board issued when it proposed to take action it set out, as required by law, the reasons why it proposed to do so. When the case was in the Court below the appellant admitted that almost all the grounds of complaint were well founded and his only excuse was that he was not responsible for some of the defects and omissions, but the blame should be placed on the commissioner and the mahanamdar who were responsible for the repairs of the temple. It is not denied that the complaints were of such a nature that the Board could take action under Chapter VI-A. In these circumstances it is impossible for the appellant with reason to say that the Board has acted in an arbitrary manner. The facts in *Deivasikamani Ponnambala Desikar* v. *The Board of Commissioners for H.R.E., Madras*[1] were entirely different to the facts we have here. There the action of the Board could only be regarded as perverse. Here the record shows that the Board was fully justified in taking the action which it did. Moreover, as the appellant did not file objections when he was given the opportunity to do so he cannot be allowed to raise them in a suit.

The suit was rightly dismissed by the learned Judge and consequently the appeal will be dismissed with costs.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Appellate Jurisdiction.*]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BELL.

A. Rajagopala Aiyar and others .. *Appellants** (*Defts.*).

v.

S. Ramachandra Aiyar .. *Respondent* (*Plff.*).

Rajagopala Aiyar *v.* Ramachandra Aiyar.

Principal and surety—Mortgage—Person making himself liable in case of need—Moneys of obligor going to discharge debt—Right to benefit of security given by principal to creditor—Equitable relief—English mortgage—Test—Transfer of Property Act (IV of 1882), section 58.

The respondent's father had insured his life with two insurance companies. The assured assigned to his wife and the respondent the policy

1. (1941) 2 M.L.J. 175: I.L.R. (1941) Mad. 807.
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issued by one company and assigned the other policy to his wife and four sons including the respondent. The respondent's father had executed a deed of mortgage over certain property in favour of a third person. The respondent who was also a party to the said deed made himself liable for repayment of the debt. The document, however, did not describe him as a surety and his liability was not expressly stated to be limited to default on the part of the mortgagor; but reading the document as a whole it was clear that he was brought in in case of need, and that his position was in reality that of a surety. It was shown that the moneys received from the insurance companies had gone in part in discharge of the said debt. The respondent, who was interested in one half of the insurance money under one policy and in a fifth of the money under the other policy, claimed the benefit of the security held by the mortgagee.

Held, that the respondent was entitled to the benefit of the security held by the mortgagee to the extent that his share of the insurance moneys had gone in discharge of the debt. Case held to fall within the third category of the cases calling for equitable relief mentioned by Lord Selborne in *Duncan, Fox & Co.* v. *The North and South Wales Bank*, (1880) L.R. 6 A.C. 1.

Vairavan Chettiar v. *The Official Assignee of Madras*, (1932) 63 M.L.J. 615: I.L.R. 55 Mad. 949, referred to.

The essence of an English mortgage is that the mortgagee must bind himself to repay the mortgage money on a certain date and transfer the mortgaged property absolutely to the mortgagee subject to a proviso that the mortgagee will re-transfer it to the mortgagor upon payment of the mortgage money as agreed. The fact that a clause is inserted in the deed to the effect that if the interest on the mortgage debt should be paid regularly every month the time for payment will stand extended does not mean that the mortgagor has not contracted to pay the debt on a certain date within the meaning of section 58 (3) of the Transfer of Property Act. Nor will it make any difference that the mortgagor has under the deed agreed to pay the fire insurance premium, quit rent, taxes and other outgoings in respect of the mortgaged property.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Somayya, dated 16th February, 1940 and 2nd May, 1940 respectively and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 146 of 1937 (pauper).

N. T. Shamanna for Appellants.

K. S. Sankara Aiyar for Respondent.

The Judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—This appeal arises out of a suit filed on the original side of this Court by the respondent for the redemption of a mortgage. The case presents some unusual features and it is necessary in order to appreciate the questions involved in the appeal to state in detail the history of the case. The respondent's father, S. Subramania Aiyar, was indebted to the appellants' father, Ayyaswami Aiyar, on two promissory notes. Ayyaswami Aiyar, died on the 14th September, 1919 and Subramania Aiyar on the 15th October, 1919. In 1920 the appellants instituted a suit against the widow of Subramania Aiyar and D. Venkatarama Aiyar and M. Gopala Aiyar, who had been nominated by him as the executrix and the executors of his will. On the 4th March, 1921, a decree was passed in favour of the appellants for Rs. 2,939-11-0. In execution of that decree the appellants attached the property now in suit and bought it at the sale held in pursuance of an order of the Court passed in the execution proceedings. The sale certificate was issued to them on the 22nd January, 1925 and the appellants obtained possession on the 14th

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May, 1925. The present suit was instituted by the respondent on the 14th April, 1937.

The respondent's father had insured his life with the Gresham Life Assurance Society, Limited, and with the Oriental Government Security Life Assurance Company, Limited. The assured assigned to his wife and the respondent, who is his eldest son, the policy issued by the former company and the policy issued by the latter company to them and to his three other sons. In the Court below it was taken that the assignment of the second policy was only to the sons of the assured, but we have allowed the appellants to put in an extract of the Assignment Register and this establishes that the widow was also one of the assignees. Subramania Aiyar was indebted to a person named Johnstone and to a Mrs. Booth. To Johnstone he owed Rs. 5,145-13-4 and to Mrs. Booth Rs. 7,000. To secure the debt to Mrs. Booth he mortgaged to her the property now in suit. On the 25th October, 1920, when the debt due to Mrs. Booth was discharged, there was owing Rs. 7,204-2-8. It is the respondent's case that the debt was repaid to the extent of Rs. 4,000 out of the moneys received from the Gresham Life Assurance Society, Limited and the balance of Rs. 3,204-2-8 out of the moneys received from the Oriental Government Security Life Assurance Company, Limited. The moneys obtained from the two Insurance Companies did not form part of the deceased's estate. The policies having been assigned by the testator during his lifetime, on his death the assignees became entitled to receive payment by reason of the assignments, not by reason of his will. On the ground that the mortgage in favour of Mrs. Booth was discharged out of the moneys received from these insurance companies in which he had an interest, the respondent claims that he is entitled to the benefit of the security held by her and to consequential relief.

Somayya, J., who tried the suit held that of the Rs. 4,000, which was paid out of the money received from the Gresham Life Assurance Society, Limited, Rs. 2,000 came from the respondent. Of the Rs. 3,204-2-8, which was paid out of the money received from the Oriental Government Security Life Assurance Company, Limited, the learned Judge held that one-fourth, namely Rs. 801-0-8 was the respondent's money. As the respondent had only a one-fifth share, the figure should have been Rs. 640-12-11. Having found that the respondent had paid Rs. 2,801-0-8 towards the discharge of Mrs. Booth's mortgage, Somayya, J., gave him a decree for this sum with interest at seven per cent. per annum, and directed that the property be sold in default of payment. The sale was however avoided as the appellants paid the money into Court.

The appellants challenge the validity of the decree passed by the learned Judge on several grounds. They say that (*i*) the evidence does not establish that the respondent contributed towards the discharge of the mortgage in favour of Mrs. Booth; (*ii*) the respondent is not in law entitled to the benefit of the security, even if he did contribute to the repayment of Mrs. Booth's mortgage, and (*iii*) the suit is barred by the law of limitation.

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We agree with the finding of the learned Judge that the mortgage in favour of Mrs. Booth was discharged out of the moneys received from the Insurance Companies, to the extent of Rs. 4,000, out of the moneys received from the Gresham Life Assurance Society, Limited, and to the extent of Rs. 3,204-2-8 out of the moneys received from the Oriental Government Security Life Assurance Company, Limited. We also agree with the learned Judge that the respondent was entitled to a half of the moneys received from the Gresham Life Assurance Society, Limited, but as already pointed out, he was not entitled to a fourth, but only to a fifth, of the money received from the other company.

The main question in this appeal is whether the respondent is entitled to the benefit of the security held by Mrs. Booth. The learned Judge considered that the respondent could not be regarded as a surety within the meaning of section 126 of the Indian Contract Act, but that his case fell within the third category of the cases referred to in the judgment of Lord Selborne in *Duncan, Fox & Co.* v. *The North and South Wales Bank.*[1] Lord Selborne said that there were three classes of cases in which a surety or a person in an analogous position is entitled to the benefit of security held by the creditor, namely: (1) those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.

The respondent was made a party to the mortgage deed executed by his father in favour of Mrs. Booth and he made himself liable for the repayment of the debt, although not as a mortgagor. There was only one mortgagor, the father. The respondent was referred to 'as the party of the second part', and the deed recites that he had agreed to join in at the request of the mortgagee. The document does not describe him as a surety and his liability is not expressly stated to be limited to default on the part of the mortgagor; but reading the document as a whole, it is quite clear that he was brought in in case of need and that his position was in reality that of a surety. We agree with the learned Judge that this case falls within the third category of cases referred to in *Duncan, Fox & Co.* v. *The North and South Wales Bank.*[1]

The Court in granting relief to a person in the position of a surety is not confined to contracts of guarantee within the meaning of section 126 of the Indian Contract Act and the Court is free to apply the principles of equity unless the position is go-

1. (1880) L.R. 6 A.C. 1.

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verned by some positive provisions of Indian Law and therefore the Court is entitled in a suitable case to apply any of the principles stated in *Duncan, Fox & Co.* v. *The North and South Wales Bank.*[1] This was recognised by this Court in *Vairavan Chettiar* v. *The Official Assignee of Madras*[2] although it was held in that case that *Duncan, Fox & Co.* v. *The North and South Wales Bank*[1] was not in point. There two Nattukottai Chettiars borrowed Rs. 1,00,000 from a bank on a promissory note which they both signed as makers. The bank having paid over the money, each took Rs. 50,000 for his own purposes. One of them became insolvent and the other being jointly and severally liable was called upon to repay the Rs. 1,00,000 due to the bank. The question was whether the solvent borrower who had repaid the bank was entitled to the benefit of securities which the insolvent borrower had deposited with it. The Official Assignee contended that he was not and the Court upheld the Official Assignee. The judgment in *Duncan, Fox & Co.* v. *North and South Wales Bank*[1] was discussed and it was held that the case did not fall within the third category as stated by Lord Selborne because the debt was not wholly of one, but equally of both the Chettiars. In the present case the debt was wholly that of the mortgagor. It is common ground that the property mortgaged was the separate property of the father and that the father had the benefit of the whole of the mortgage loan.

Turning now to the question of limitation, unless the mortgage is in the English form the suit will be governed by article 132 of the Limitation Act and therefore will be out of time. The learned Judge held, however, that the mortgage was in the English form and that the appropriate article was article 147 which provides for a period of limitation of sixty years. Suits for foreclosure or sale of a mortgage in the English form fall within this article. This was decided by the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai.*[3] Section 58 of the Transfer of Property Act sets out the requirements of an English mortgage. The mortgagor must bind himself to repay the mortgage money on a certain date and transfer the mortgaged property absolutely to the mortgagee, subject to a proviso that the mortgagee will retransfer it to the mortgagor upon payment of the mortgage money as agreed. The learned advocate for the appellants admits that these conditions are fulfilled, but he says there are other conditions which are not usually found in a mortgage of the English form and therefore this mortgage must be regarded as an anomalous mortgage in which case it will not fall within article 147 of the Limitation Act. The additional provisions in the deed which the learned counsel for the appellants relies on here, are these: (*i*) if the mortgage debt should not be repaid on the due date, interest shall be charged at seven per cent. per annum, and if the interest is paid regularly every month the date for payment shall be extended from the 8th

1. (1880) L.R. 6 A.C. 1.
2. (1932) 63 M.L.J. 615: I.L.R. 55 Mad. 949.
3. (1907) 17 M.L.J. 444: L.R. 34 I.A. 186: I.L.R. 30 Mad. 426 (P.C.).

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October, 1916 to the 8th April, 1919; and (*ii*) the mortgagor shall pay the fire insurance premiums, quit-rent, assessment rates, taxes and other outgoings for the time being payable in respect of or charged upon the property. He also says that although there is a provision for the extension of the time for the payment of the mortgage debt it is not accompanied by a stipulation that the mortgagee should reconvey and that this changes the character of the mortgage.

Unless these provisions can be read as altering the obligation of the mortgagor to pay the mortgage debt on a specified date or detract from the absolute nature of the transfer, the mortgage must be regarded as being in the English form. The fact that in a certain event the date of payment is changed from the 8th October, 1916 to the 8th April, 1919 does not mean that the mortgagor has not contracted to pay the debt on a certain date within the meaning of section 58 (3) of the Transfer of Property Act, and the fact that the mortgagor has agreed to pay the cost of insurance and other charges does not detract from the absolute transfer to the mortgagee. In *Raja Janki Nath Ray* v. *Syed Asad Reza*,[1] the Patna High Court held that a stipulation which gave the mortgagor options with regard to part payment and extension of time for repayment of the principal sum did not affect a clause in the mortgage bond under which the mortgagor bound himself to pay the mortgage money on a certain date.

Nor did a provision in the bond requiring the mortgagor to pay in addition to the mortgage debt and interest, further advances and sums paid by the mortgagee for the protection and preservation of the mortgaged property and Government revenue, rents and all other costs, charges and expenses incurred in connection with the property make the mortgage any the less an English mortgage within the definition given in section 58 of the Transfer of Property Act.

For the appellants reliance has been placed upon the decision of the Calcutta High Court in *Satya Charan Srimani* v. *Ramkinkar Banerjee*,[2] where it does appear that the view was taken that a provision in a mortgage deed requiring the mortgagor to pay 'rent, royalty, cesses, taxes, rates, assessments and impositions which now are or hereafter may be payable in respect of the said premises' did change the character of the mortgage. But dissent from this view is indicated by the decision of the same Court in *Cohen* v. *Baidya Nath Mukherji*.[3] It may be mentioned that *Satya Charan Srimani* v. *Ramkinkar Banerjee*[2] was carried to the Privy Council but there it was held that it was not necessary to decide whether the mortgage in that case was in the English form (*Ram Kinkar* v. *Satya Charan*[4]). We are not prepared to accept *Satya Charan Srimani* v. *Ramkinkar Banerjee*[2] as embodying a correct indication of the answer to be given here.

1. (1935) I.L.R. 14 Pat. 560.
2. (1935) 62 C.L.J. 28.
3. I.L.R. (1937) 1 Cal. 359.
4. (1939) 1 M.L.J. 544: L.R. 66 I.A. 50: I.L.R. (1939) 1 Cal. 283 (P.C.).

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There is no substance in the third contention of the appellants. The mortgage deed contains a stipulation that the mortgagee shall reconvey on payment being made on the 8th October, 1916 and this stipulation must be read as applying also in the event of the time being extended to the 8th April, 1919.

For the reasons given we hold that the additional provisions in the mortgage deed in suit do not alter the character of the mortgage. Consequently we concur in the finding of Somayya, J., that the mortgage is in the English form, which means that the suit was filed in time.

The appeal fails except as regards the decretal amount. As already indicated the respondent is only entitled to Rs. 2,640-12-11, but this sum will carry interest at the rate fixed by Somayya, J. The decree of the trial Court will be varied to this extent. The parties will pay and receive proportionate costs. Out of the money in deposit in Court, so much of it as is due to the respondent under the decree passed by this Court will be paid out to him on his complying with the other requirements of the decree.

B.V.V. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Somayajulu Venkatanarasimham .. *Petitioner** (*5th Respt.*)

v.

Govinda Suryanarayana being minor represented by his maternal grandfather and next friend, Nadiminti Ganeswara Rao and others ... *Respondents* (*Petr. and Respts.*).

Venkatanarasimham *v.* Suryanarayana.

Madras Agriculturists' Relief Act (IV of 1938), section 23—Application by wrong person—Whether can be sustained as one on behalf of right person—Objection to petition—Transposition of respondent as petitioner—Permissibility—Applicability of Order 1, rule 10, Civil Procedure Code, 1908.

The basis of an application under section 23 of Madras Act IV of 1938 is, firstly a sale in execution of a decree of land in which an agriculturist has an interest, and secondly, an application within ninety days of the commencement of the Act by a judgment-debtor who is an agriculturist entitled to the benefits of the Act, to have the sale set aside. It is not therefore possible for a person who does not possess the necessary qualifications to move the Court to set aside the sale on behalf of someone else who does possess the necessary qualifications.

Where an application under section 23 is first filed by a wrong person for his own benefit and without any idea of benefiting the real person entitled to the right, the application cannot be rendered valid by subsequently transposing a judgment-debtor respondent as petitioner and thus overcoming the objection to the maintainability of the application. To such a case the provisions of Order 1, rule 10, Civil Procedure Code, have no application.

Petitions under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Special Deputy Collector of Chicacole Division, dated the 27th day of January, 1940 and made in M. P. No. 77 (*b*) of 1938.

C. V. Dikshutulu for Petitioner.

V. Govindarajachari and *S. Ramamurthi* for Respondents.

*C.R.Ps. Nos. 1333 and 1663 of 1940. 2nd April, 1942.

Venkata-narasimham v. Surya-narayana.

The Court delivered the following

JUDGMENT.—These revision petitions both contest the correctness of an order passed in an application under section 23 of Act IV of 1938, whereby in November, 1938, one of the judgment-debtors under the decree in a rent suit, who had been impleaded as counter-petitioner, was transposed as a petitioner when a doubt was raised as to the competency of the original petitioner to maintain the application. The petitioners under C.R.Ps. Nos. 1663 and 1333 are the landholder and the auction-purchaser respectively. The sale was held in January, 1938. The contesting respondent who was a mortgagee from the 1st judgment-debtor filed an application under section 23 on the 10th June, 1938, less than a fortnight before the expiry of the period allowed in section 23. An objection being raised to the maintainability of the application on the ground that the applicant was not a judgment-debtor, the applicant seems to have sought to get round the difficulty by getting one of the judgment-debtors to join him in the array of applicants.

The basis of an application under section 23 is, firstly a sale in execution of a decree of land in which an agriculturist had an interest, and secondly, an application within 90 days of the commencement of the Act by a judgment-debtor who is an agriculturist entitled to the benefits of the Act, to have that sale set aside. It is not therefore possible for a person who does not possess the necessary qualifications to move the Court to set aside the sale on behalf of someone else who does possess the necessary qualifications. The application by the respondent cannot be regarded as an application on behalf of the 2nd judgment-debtor; nor, in fact, did the application purport to be on behalf of the pattadars or to rest on their qualifications in any way. At the time when the 2nd judgment-debtor was transposed an application by him would have been time-barred by some four months.

This is not in my opinion a case to which Order 1, rule 10 has any application. There is no question of a *bona fide* mistake in filing the application in the name of a wrong person for the benefit of the right person. The application was filed by the wrong person for his own benefit and without any idea of saving the land for his mortgagors. I am of opinion that the Court had no jurisdiction to order this transposition merely in order to enable the original applicant to overcome a valid objection to the maintainability of his application. More especially is this so if, as appears to be the case here, the person transposed had separately filed a petition claiming substantially the same relief, which petition had been dismissed and against which dismissal an appeal was pending. I have not got before me the papers in this other matter; but from the recitals in the lower Court's judgment it would appear that the 2nd counter-petitioner had applied under section 15 to have the sale set aside. It seems not improbable that section 15 was quoted when the proper section should have been section 23. The 2nd counter-petitioner in whose interests this order is alleged to have been made has not thought fit to appear in this Court and support the order, the civil revision petitions being contested only by the original applicant.

Venkata-narasimham *v.* Surya-narayana.

In the result therefore I am of opinion that the lower Court had no jurisdiction to order this transposition with a view to overcome the statutory provisions of section 23 regarding limitation. The revision petitions are allowed with costs, payable by 1st respondent in C.R.P. No. 1333 and the 5th respondent in C.R.P. No. 1663, and the order of the lower Court is set aside.

B.V.V. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Madavarvilagam Sri Vaithinathaswami Devasthanam, Srivilluputhur, through its executive officer Subramaniam .. *Appellant** (*Deft.*)

v.

V. Anantharama Aiyar .. *Respondent* (*Plff.*).

Sri Vaithina-thaswami Devasthanam *v.* Anantharama Aiyar.

Madras Estates Land Act (I of 1908), section 13 (3)—Second crop raised on land registered as single crop land—Tenant taking water from well dug by himself—When liable for additional rent.

A claim by a landholder for additional rent, in respect of a second crop raised on registered single crop land with the aid of water from wells dug by the ryot at his own expense, will be valid only if there is a contract between the landholder and the ryot entered into before the date of the Estates Land Act undertaking to pay such additional rent alleged and proved.

Appeal against the decree of the District Court of Ramnad at Madura in A.S. No. 129 of 1936 preferred against the decree of the Court of the Sub-Collector of Sivakasi in Suit No. 262 of 1935.

R. Desikan for Appellant.

V. Ramaswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The landholder, who was the defendant in the trial Court, is the appellant in this second appeal. When he attempted to bring the ryot's holding to sale under the provisions of section 111 of the Madras Estates Land Act, the ryot brought the suit for a declaration that the amount which is sought to be recovered for the non-payment of which the sale was attempted, is not legally due from him. What we are now concerned with is the claim made by the landholder in regard to the second crop raised on his holding by the plaintiff—the ryot. The allegation of the landholder was that the water with which the second crop was raised was the water of the tank belonging to himself. He also alleged that even if the second crop was raised with water from wells dug by the ryots themselves, he is nevertheless entitled to charge for the second crop. The lower Court held that during the fasli in question the ryot did not use the landholder's water and that the second crop was raised with the aid of wells constructed by the ryots. On this finding both the Courts held that the landholder is not entitled to any additional rent, or charge in respect of the second crop. The defendant appeals.

If the lands are registered as single crop lands as they are in this case, the ryot is bound to pay an additional charge if he

*S.A. No. 972 of 1939. 7th November, 1941.

raises a second crop with the aid of the landholder's water. If he does so, the landholder is entitled to an additional charge, whether you call it water-rate or additional rent. In such cases it is usual to find stipulations that if a second crop is raised with the aid of the landholder's water, half the rate which is fixed for the first crop should be paid, and that is the rate which is claimed in this case and such a charge would be rent whether it is called water cess or by any other name (see *The Madura Kallalagar Devasthanam* v. *Subbiah Ambalam*[1]). There the ryot took water for the second crop from the landholder's tank without his permission. It was held that the landholder is entitled to recover additional charge as rent in the Revenue Court. A case where the ryot takes the landholder's water with his consent would be an *a fortiori* case. If in this case in any year the ryot takes the water of the landholder and raises a second crop with the aid of that water, then the landholder is entitled to levy an additional charge and sue for the recovery of it as rent in Revenue Courts. If the second crop is raised with the aid of wells constructed by the tenants themselves, as held by this Court in *Periakaruppa Mukkandan* v. *Raja Rajeswara Sethupathi*,[2] if there was a contract between the landholder and the ryot entered into before the date of the Madras Estates Land Act under which the ryot undertook to pay additional rent even if the crops were raised with the aid of wells dug by the ryot at his own expense, such a contract would be valid and binding on the ryot. In this case a contract which would come within the principle laid down in this decision was not alleged. It is now too late to ask for a remand for an investigation whether there was such a contract or not. If in any case such a contract is proved, then the landholder will have the benefit of the decision in the above case.

The second appeal is accordingly dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Timiti Venkata Charlu and another .. *Appellants** (*Defts.*)

v.

The Rajah of Vizianagaram and another .. *Respondents* (*Plff's L. Rs.*).

Venkata Charlu v. Rajah of Vizianagaram.

Adverse possession—Inam lands—Inamdar's possession adversely to Zamindar—Twelve years possession sufficient to perfect title—Civil Procedure Code (V of 1908), section 100—Question whether admitted facts amount to assertion of title—Question of law.

Where the only question is whether an inamdar has established his title adversely to a Zamindar, the question of Government's right to resume the *inam* cannot possibly come up for any kind of consideration. Accordingly the ordinary rule will apply which prescribes for the perfecting of title by adverse possession only a period of twelve years and not sixty years.

The question whether certain admitted facts constitute an open assertion of title is a question of law which can be dealt with in a second appeal.

Appeal against the decree of the District Court of Vizagapatam in A.S. No. 203 of 1937 preferred against the decree

1. (1940) 1 M.L.J. 160: I.L.R. (1940) Mad. 745.
2. (1918) 36 M.L.J. 320: I.L.R. 42 Mad. 475 (F.B.).

*S.A. No. 1023 of 1939. 20th February, 1942.

Venkata Charlu v. Rajah of Vizianagaram.

of the Court of the Sub-Collector of Parvatipur Division in E. L. Suit No. 496 of 1935.

B. Jagannadha Das and *S. Ramamurthi* for Appellants.

S. Venkatesa Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The subject-matter of this appeal is a portion of Survey No. 197|3 in the village of Kagam. The appellants claim that the whole of the survey number and therefore the portion now in dispute belongs to them as part of their inam. The contesting respondents on the other hand contend that the property in dispute is jeroyiti property of the Vizianagaram estate. The suit was one for rent based upon the assertion that the rent was leviable from the jeroyiti property. The suit has been dismissed by the Sub-Collector and has been decreed in part by the learned District Judge of Vizagapatam. The learned District Judge holds that in respect of a part of the land no decree can be given to the plaintiffs because there is a survey decision against them establishing the title of the defendants to the property. On the other hand he has held that the survey decision does not extend to the remainder of the field and that although the defendants have been in possession of this part of the field for 30 years or more they have been unable to prove any title by adverse possession. He states that the contesting respondents, that is to say the present appellants, at no time more than 12 years before the filing of the suit had openly asserted their inam title to this portion of Survey No. 197|3 adversely to the Raja's melvaram right. This is no doubt in one respect a finding of fact but it seems to me that the question whether certain admitted facts constitute an open assertion of title is a question of law and in this case the learned District Judge is clearly wrong in holding that there has been no open assertion of title. I have been referred to the pleadings in two previous suits, one in 1911 and the other in 1917. In the first, the present 1st appellant was the 3rd defendant and the Vizianagaram estate was the 1st defendant. The assertion which is contained in the written statement filed in common by the 3rd defendant and the other defendants was to the effect that the suit lands were not the jeroyiti lands of the 1st defendant but the inam lands of the other defendants. In the suit in 1917 the Vizianagaram estate was the plaintiff and the present 1st appellant was the 1st defendant. It was a suit for rent and the 1st defendant in common with the other defendants contended that the suit lands were their inam lands. It is conceded by the learned advocate for the respondents here that the subject-matter of both these suits in 1911 and 1917 is identical with the subject-matter of the present suit. It is conceded also that whatever other differences there may be in the array of parties in those suits, the present 1st appellant was himself a party in both of them and that the written statement to which reference has been made was his written statement. It is quite clear from these facts that the subject-matter of the present suit has been asserted by the present 1st appellant in both 1911 and 1917 to belong to him. There can be no clearer instance of an

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open assertion of title made publicly in regularly constituted suits in which the title to the property in question was definitely in issue.

The learned District Judge proceeds further to argue that even if adverse title had been made out for a period of 30 or 40 years it would be insufficient to protect the present appellants against the suit of the estate as where there is an inam right to any land no adverse title can be perfected by a period of less than 60 years. The argument is that wherever an inamdar claims title to land that title necessarily involves certain rights in Government to resume the inam. No doubt this fact is true, but it is quite clear that it can be applied only to suits between the Government and the inamdar. If it is a question of whether an inamdar has established a title adversely to the Government, then of course the question will be whether his adverse possession has extended to 60 years or more. But where the only question is whether an inamdar has established his title adversely to a Zamindar the question of Government's rights cannot possibly come up for any kind of consideration. The ordinary rule will therefore apply which prescribes a period of only 12 years for the perfecting of title by adverse possession. The result is that the present appellants are entitled to a declaration that they are now entitled as inamdars to the land in question and therefore that no rent can be levied from them. This appeal must therefore be allowed and the suit filed by the estate be dismissed with costs throughout.

Leave refused.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Inampudi Srinivasa Rao and others .. *Appellants** (*Plffs.*)

v.

Gadamsetti Papa Rao and another .. *Respondents* (*Defts.*).

Srinivasa Rao v. Papa Rao.

Government of India Act (1935), *section* 270 (2)—*Suit for damages against servants of the Crown for wrongful arrest—Burden of proof as to want of* bona fides.

A suit for damages for wrongful arrest alleged to have been made by police officers (servants of the Crown) falls within the ambit of section 270 (2) of the Government of India Act and the onus of proving want of *bona fides* would lie on the plaintiff and not on the servants of the Crown.

Appeal against the decrees of the Court of the Subordinate Judge of Bezwada in A.S. Nos. 55, 56 and 57 of 1939 preferred against the decrees of the Court of the District Munsiff of Bezwada in O.S. Nos. 100, 102 and 104 of 1937, respectively.

K. Krishnaswami Aiyangar and *N. Suryanarayana* for Appellants.

The Government Pleader (*K. Kuttikrishna Menon*) and *S. Ramamurthi* for Respondents.

The Court delivered the following

JUDGMENT.—This is a batch of three appeals. The suits which gave rise to these appeals were for damages for wrongful

*S.A. Nos. 639, 859 and 860 of 1940. 6th March, 1942.

Srinivasa Rao v. Papa Rao.

arrest alleged to have been made by the defendants who are police officers that is to say, servants of the Crown. The defendants alleged that they had arrested the plaintiffs in the discharge of their duties. The lower appellate Court did not believe the evidence of the plaintiffs, believed the evidence of the defendants and dismissed the suits. It was of the opinion that the allegations made on behalf of the plaintiffs had not been substantiated by them. The plaintiffs appeal.

Learned counsel for the appellants argued that the onus of proving want of *bona fides* was on the defendants but in this he was mistaken. When his attention was invited to section 270, subclause (2) of the Government of India Act he had to admit that in cases which fall within the ambit of that section the onus of proving want of *bona fides* would lie on the plaintiff and not on the servants of the Crown. It is true that the judgment of the lower appellate Court is not very happily worded but there is no doubt as to what the lower appellate Court actually decided in the case. The lower appellate Court did not believe any of the plaintiffs' witnesses and was inclined to accept the statements made by the defendants. The conclusion on that basis was foregone and the suit had to be dismissed.

The appeals fail and are dismissed with costs. Advocate's fee in the three cases in one set, rest separate. Leave is refused.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR.

Gunda Narasimham .. *Appellant.**

Narasimham, *In re.*

Court-Fees Act (VII of 1870), section 17—Applicability—Suit by purchaser under a sale-deed for possession and in the alternative for recovery of consideration money paid by him—Claim if one in respect of "two distinct subjects" for purposes of court-fee.

A suit by a purchaser for possession of the property sold to him and in the alternative for the recovery of the consideration money paid by him was valued at Rs. 955 made up of Rs. 925 representing the value of the property and Rs. 30 the mesne profits. The same figure of Rs. 955 was the value of the alternative relief made up of Rs. 925 the amount of consideration for the sale-deed and Rs. 30 the incidental expenses. On the question of court-fee,

Held, that the claim did not embrace two distinct subjects, within the meaning of section 17 of the Court-Fees Act and a single court-fee based on the valuation at Rs. 955 was all that could be levied.

Appeal sought to be filed against the decree of the Court of the Subordinate Judge of Guntur, in A.S. No. 11 of 1938, preferred against the decree of the Court of the District Munsiff of Guntur in O.S. No. 662 of 1936.

V. Rangachari for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

The Court made the following

ORDER.—The matter relates to a question of court-fee. The plaintiff who is the appellant purchased the property in suit

*S.R. No. 34266 of 1941. 3rd July, 1942.

Narasimham, *In re.*

under a sale-deed in his favour, dated 26th June, 1936. The seller was the 1st defendant and he is the 1st respondent here; and the sale-deed was executed pursuant to a written agreement between the parties, dated 22nd June, 1936. On the next day namely 23rd June, 1936, the 1st defendant along with certain others entered into a similar written agreement with respondents 5 and 6 to sell the same land to them. This agreement also was followed by a regular sale-deed, dated 30th June, 1936. The appellant founding himself on the earlier agreement and the sale-deed in his favour instituted the suit out of which this second appeal has arisen for possession of the property sold to him and in the alternative for the recovery of the consideration money paid by him. He valued the suit at Rs. 955 made up of Rs. 925 representing the value of the property, and Rs. 30, the mesne profits claimed and paid court-fee on that amount. The same figure of Rs. 955 is the value of the alternative relief and it is made up of Rs. 925 the amount of the consideration for the sale-deed, and Rs. 30 for the incidental expenses. He failed in the first Court and in the appeal which he preferred, he paid the same court-fee. Having again failed, he has preferred the present second appeal.

The question is whether his claim embraces two distinct subjects within the meaning of section 17 of the Court-Fees Act. It is perfectly plain that he is seeking in the first instance to obtain a single relief by way of possession with which he will be completely satisfied. But if for some reason or other, the Court is unable to give him this relief, he prays in the alternative for the return of the consideration amount paid by him. It appears to me that the question of what is the proper court-fee in such a case is really governed by the principle of the decision reported in *Rangaswamy Reddiar* v. *Venkataperumal Reddiar.*[1] In that case as in the present there was only one cause of action, on which two reliefs were claimed. A settlement deed had been executed for a consideration of Rs. 22,000. The first relief was for setting aside the deed of settlement. The second and alternative relief was for the recovery of the consideration on the footing that though the deed might be good, the consideration money had not been paid. In other words, one of the reliefs was claimed on the footing of the validity of the deed and the other on the footing of its invalidity. The Court held that a single court-fee based on a valuation of Rs. 22,000 would be sufficient for both the reliefs, as they did not constitute two distinct subject-matters.

An earlier decision by a Bench of this Court in *Neelakandhan* v. *Ananthakrishna Aiyar*[2] was also referred to. At page 64 the following observations occur:

> "The phrase 'two or more distinct subjects' in section 17 may not admit of precise definition applicable to all cases, and it may be that where reliefs are claimed in the alternative with reference to the same cause of action, section 17 would not govern the case."

Although the decision in the particular case was that the alternative claims were distinct matters within the meaning of section

1. (1938) 1 M.L.J. 139.
2. (1906) 16 M.L.J. 462: I.L.R. 30 Mad. 61.

Narasimham, *In re.*

17 it was due to different considerations from those present in this case. I am clearly of opinion that the present case does not fall under section 17 of the Court-Fees Act and one single court-fee based on the valuation of the second appeal at Rs. 955 is all that can be levied in the present case.

K.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

T. K. Ramachandra Rao .. *Petitioner** (*Petitioner*)

v.

Jomalagadda Ramaswami .. *Respondent* (*Respondent*).

Ramachandra Rao *v.* Ramaswami.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 4 (d) *and* 8—*Previous mortgage transaction excluded by section* 4 (d)—*Promissory note for interest due thereon—If can be scaled down as renewal of earlier transaction.*

When it is shown that an earlier mortgage is excluded from the operation of Act IV of 1938 by section 4 (*d*) a subsequent promissory note by the same debtor cannot be scaled down as a renewal of the previous transaction in so far as it embodies the interest thereon.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Kurnool, dated 1st December, 1939 and made in I.A. No. 270 of 1938 in S.C.S. No. 531 of 1937.

A. Bhujanga Rao and *D. R. Krishna Rao* for Petitioner.

Ramanujam and *Venkataseshayya* for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was the defendant in a suit on a promissory note. The promissory note was admittedly made up entirely of interest on three previous debts. With reference to two of these debts the lower Court has granted relief on the basis that the promissory note is merely an embodiment of the interest on these debts. With reference to the other debt which is a mortgage debt Ex. II, the lower Court has refused to grant relief because the security for Ex. II is house property within a union panchayat coming within section 4 (*d*) of Act IV of 1938. It seems to me that the view taken by the lower Court is correct.

The petitioner was not content to stand by the promissory note as the contract but wished to treat the promissory note as nothing more than a settlement of account under the previous mortgage transactions. By this process the promissory note is, in fact, treated as a mere statement of the interest on the previous transactions. When it is shown that one of these previous transactions is excluded from the operation of the Act by section 4 (*d*), it seems to me to follow that the promissory note cannot be scaled down as a renewal of that transaction in so far as it embodies the interest therein. There was no prayer that to the extent of the interest on Ex. II the promissory note should be scaled down under section 9 of the Act. I therefore do not propose to go into that contention.

The revision petition is dismissed with costs.

K.S. ——— *Petition dismissed.*

*C.R.P. No. 841 of 1940. 6th February, 1942.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Nanduri Sarangapani .. *Petitioner** (*Defendant*)

v.

Yanduri Venkata Ratnam and another .. *Respondents* (*Plffs.*).

Sarangapani *v.* Venkata Ratnam.

Madras Agriculturists' Relief Act (IV of 1938), section 3 (ii), proviso D—Applicability—Annual payment of a fixed sum of Rs. 600 by mokhasadar to Zamindar towards the cist instead of the previous payment varying with the yield at Rs. 4 per putti—If disqualifies mokhasadar under proviso D to section 3 (ii) of the Act from being an agriculturist.

Where lands continued to be held by a mokhasadar on a payment varying with the yield, of Rs. 4 per putti up to 1889, on which date there was an agreement between the Zamindar and the mokhasadar, that instead of the varying payment an annual sum of Rs. 600 should be paid "towards cist",

Held, that the fixed annual payment to the Zamindar is in the nature of a quit-rent or kattubadi which will disqualify the mokhasadar under proviso D to section 3 (*ii*) of Act IV of 1938 from being an agriculturist entitled to the benefits of the Act.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Bezwada, dated 5th August, 1940, in S.C.S. No. 1772 of 1939.

N. G. Krishnamachari for Petitioner.

V. Subramanyam for Respondents.

The Court delivered the following

JUDGMENT.—The only question in this revision petition is whether the petitioner is entitled to the benefits of Act IV of 1938. Admittedly he is a mokhasadar paying Rs. 150 per annum to the Zamindar of Talaprole under an ancient tenure, the origin of which is rather obscure. We know that a proposal to enfranchise the inam fell through at the time of the Inam Commission, and that the lands continued to be held on a payment varying with the yield, of Rs. 4 per putti up to 1889, on which date there was an agreement between the Zamindar and the mokhasadar, that instead of this varying payment an annual sum of Rs. 600 should be paid "towards the cist," the mokhasadars pledging themselves to pay the *meras* and cesses. It is contended that this annual payment, of which the defendant's share is Rs. 150, cannot be described as quit-rent, *jodi, poruppu* or the like so as to disqualify the defendant under proviso D to section 3 (*ii*) of the Act from being an agriculturist. It seems to me apparent that the only difference between the annual payment made by these mokhasadars and the quit-rent paid on other old inams is that the rate in the present case was fixed not at the time of the Inam Commission, but by the subsequent agreement with the Zamindar. I have no doubt that the defendant and his fellow mokhasadars are landholders and that they hold their estate on a fixed and favourable rate of rent and that such fixed favourable rent payable in respect of their enjoyment of a portion of the proprietor's rights to

*C.R.P. No. 2303 of 1940. 3rd July, 1942.

Sarangapani v. Venkata Ratnam.

the principal proprietor is in the nature of a quit-rent or kattubadi.

A point of limitation has been raised, but as it was not pleaded in the written statement, and if it had been pleaded, might have been met by a slight amendment of the plaint, I do not think it proper to allow it to be argued in revision.

The revision petition is therefore dismissed with costs.

K.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Chulliyat Govindan Nair .. *Petitioner* (Plaintiff)*

v.

Moozhiyut Imbichi Mammad .. *Respondent (Defendant).*

Govindan Nair v. Imbichi Mammad.

Madras Agriculturists' Relief Act (IV of 1938), *section* 10 (2) (i) —Kanom *for Rs.* 300 *providing for payment of Rs.* 36 *annually as michavaram—Further borrowing of Rs.* 200 *on* puramkadam *by which* jenmi *was to pay Rs.* 20 *annually as* labham *to be set off against the* michavaram—"Labham"—*If can be scaled down as "interest"*—Puramkadam *transaction if protected by section* 10 (2) (i) *of the Act.*

Under a *kanom* document of 1924 the *jenmi* received Rs. 300 and the *kanomdar* undertook to pay annually Rs. 36 as *michavaram*. In 1927 the *jenmi* borrowed a further sum of Rs. 200 on a *puramkadam* by which he agreed to pay Rs. 20 annually as *labham* which the *kanomdar* was to set off against the *michavaram* payable by him. On the question whether the *puramkadam* transaction was protected by section 10 (2) (*i*) of Madras Act IV of 1938,

Held: An annual compensation paid by a borrower to a lender for the use of the lender's money is "interest" by whatever name called and can be scaled down. The words "rate of interest" in section 10 (2) (*i*) of Madras Act IV of 1938 do not necessarily imply that a particular percentage need be stipulated in the document. Provided that the actual amount of interest is fixed by the document the transaction is not protected by section 10 (2) (*i*) of the Act. It cannot be said that the *puramkadam* merely provides for a lower rate of rent for an increase in the *kanom* amount.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Quilandi, dated the 27th day of February, 1940 and passed in S.C.S. No. 261 of 1939.

S. Venkatachala Sastri for Petitioner.

C. K. Viswanatha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner here was the plaintiff in the lower Court and he filed a small cause suit for rent. The petitioner demised the land to the respondent in 1924 under a kanom document whereby he received Rs. 300 and the respondent undertook to pay annually Rs. 36 as rent or michavaram together with certain sundry charges. On 14th October, 1927, the petitioner borrowed a further sum of Rs. 200 on what is known as a *puramkadam* which is embodied in a document the terms of which are that a further charge to the extent of Rs. 200 should be created over the jenm interest in favour of the kanomdar and that in consideration of

*C.R.P. No. 1489 of 1940. 20th March, 1942.

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this further advance, the petitioner jenmi agrees to pay Rs. 20 annually as *labham* and it is further provided that the respondent the kanomdar is entitled to adjust this sum of Rs. 20 annually towards the rent which he has to pay to the petitioner and pay only the balance. Now the petitioner in suing for rent claimed that this amount of *labham* which he was entitled to set off against the rent, was nothing more than interest payable on the second advance and that he was entitled to scale down that interest under section 8 of Act IV of 1938 so as to reduce the interest to 6 1|4 per cent. and he therefore adjusted interest at this scaled down rate and claimed the balance of rent under the original demise. The lower Court has held that the effect of the *puramkadam* document is really nothing more than to provide for a lower rate of rent in consideration for an increase of the kanom amount and that there is really no interest payable and that the transaction is protected under section 10 (2) (*i*) of Act IV as being a possessory mortgage where no rate of interest is stipulated as due to the mortgagee. No doubt the practical effect of these two transactions may be something similar to that which the learned District Munsiff assumes. But the way in which the *puramkadam* document has been drawn seems to me to make it clear that the second mortgage advance is not to be treated as a mere accretion to the first advance with a reduction in the rate of rent payable under the demise. There is a clear covenant by the mortgagor in respect of the second advance of Rs. 200 to pay annually a sum of Rs. 20 as *labham*. *Labham* apparently is not a technical term at all but a general word meaning profit, compensation or interest as the case may be. But if we translate this word *labham* by a colourless word like 'compensation' we have an advance of Rs. 200 on security of immovable property the mortgagee being entitled to an annual payment or compensation of Rs. 20 the property being already in his possession under a previous mortgage—*cum*—leasehold arrangement. An annual compensation paid by a borrower to a lender for the use of the lender's money is interest, by whatever name we call it and although section 10 (2) (*i*) of Act IV uses the words 'rate of interest', I do not think that those words necessarily imply that a particular percentage need be stipulated in the document, provided that the actual amount of the interest is fixed by the terms of the document. Here clearly, there is a contract whereby a mortgage is created for a sum of Rs. 200 with an annual interest of Rs. 20. That is another way of saying that the loan carries interest at ten per cent. It is, in my opinion, not protected by section 10 (2) (*i*) of the Act and the plaintiff in claiming the rent is entitled to have his debt for interest scaled down before it is adjusted to the rent.

I therefore allow the civil revision petition with costs and give the plaintiff a decree for the amount claimed as prayed for with full cost in the trial Court.

K.S. —————— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Natesa Mudaliar .. *Appellant** (*2nd Deft.*)

v.

M. T. Rajamanicka Chettiar .. *Respondent* (*Plff.*).

Natesa Mudaliar *v.* Rajamanicka Chettiar.

Madras Agriculturists' Relief Act (IV of 1938), section 19—Scope—Payment by defendant pending the suit—Appropriation in the decree (passed before 1st October, 1937) to interest due on suit mortgage—Re-appropriation to principal—If can be claimed.

There is no provision in Madras Act IV of 1938 for re-appropriation of payments made before 1st October, 1937, excepting the proviso to section 19 which deals with payments made under a decree.

Where pending a suit on a mortgage the defendant made a payment which was appropriated in the decree (dated 3rd October, 1936) to the amount of interest due on the mortgage without objection it is not open to the defendant to urge in second appeal that the payment should be appropriated towards the principal. The fact that the appropriation was made by the Court and not by one of the parties makes no difference.

Appeal against the decree of the District Court of Chingleput in A.S. No. 231 of 1936 preferred against the decree of the Court of the Subordinate Judge of Chingleput in O.S. No. 31 of 1935.

S. Ramachandra Aiyar and *S. Natarajan* for Appellant.

N. Srinivasa Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The main contention in this appeal relates to a payment of Rs. 450 made by the 7th defendant pending the suit. In the decree which is dated 3rd October, 1936, this sum of Rs. 450 is appropriated to the amount of interest due on the mortgage. No objection appears to have been taken to this appropriation and when the appeal was filed before the lower Court, it was not contended that this appropriation was wrong. The lower appellate Court's decree is, dated 29th August, 1940. It is now contended that it is open to the defendants to urge that this sum of Rs. 450 should be appropriated towards principal. I cannot accept this contention. The reopening of a decree under section 19 of Act IV of 1938 is for the purpose of applying the provisions of the Act to that decree. There is no provision in the Act which permits the re-appropriation of payments made before 1st October, 1937, except only the proviso to section 19 which deals with payments made under the decree. Although in the present case the appropriation seems to have been made by the Court which necessarily had to make an appropriation in order to work out the amount due under the decree, the appropriation is just as binding on the parties who did not object to it as if it had been made by one of the parties before the decree was drafted. At any rate there is no provision in the Act which permits the reopening of this appropriation which is not in respect of a payment made under the decree.

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*S.A. No. 162 of 1941. 1st April, 1942.

Natesa Mudaliar v. Rajamanicka Chettiar.

On a minor point the appeal must however succeed. The lower appellate Court has allowed interest on costs at 6 per cent. The decree for costs has to be treated as a debt to be scaled down under section 9 of the Act and the interest thereon will run at 5 per cent. from the date of the decree to 22nd March, 1938, and thereafter at the decree rate of 6 per cent. Subject to this slight modification the second appeal is dismissed with costs.

Leave to appeal is refused.

K.S. — *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Puthiottil Chathiyelan Kanna Kurup .. *Petitioner** *(Petr.-1st Deft.)*

v.

Mayimmoli Raman Nayar .. *Respondent (Respt.-Plff.).*

Chathiyelan Kanna Kurup v. Raman Nayar.

Provincial Small Cause Courts Act (IX of 1887), *section* 17—*Application to set aside* ex parte *decree—No cash deposit—Draft security bond only put in within thirty days—Application liable to be dismissed.*

Though an order of Court permitting the giving of security may have been rightfully obtained subsequently to the filing of an application to set aside an *ex parte* decree passed on the small cause side of a Court, if in fact no security has been given within the thirty days permitted by limitation for the filing of an application to set aside an *ex parte* decree—a draft bond alone having been put in within that time, the filing of the registered bond having been postponed till the result of the testing of the draft bond should be known—the application to set aside the *ex parte* decree is liable to be dismissed for non-compliance with the requirements of section 17, Provincial Small Cause Courts Act.

Balakrishna Aiyar v. *Pichamuthu Pillai,* (1921) 15 L.W. 186, followed.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Badagara, dated 21st July, 1941 and made in S.I.A. No. 85 of 1941 in S.C.S. No. 28 of 1941.

C. K. Viswanatha Aiyar for Petitioner.

M. C. Sridharan for Respondent.

The Court delivered the following

JUDGMENT.—This petition arises out of an application by the petitioner to set aside an *ex parte* decree passed by the District Munsiff of Badagara sitting on the small cause side. The procedure in regard to the presentation of such applications is laid down in section 17 of the Provincial Small Cause Courts Act. It provides that at the time of the presentation of the application there must be either the deposit of the amount due under the decree or such security for the performance of the decree as the Court may on a previous application made by the applicant in this behalf have directed. The facts are that in this case the application was made on the 7th April, 1941, which was four days after the *ex parte* decree had been passed. The application was not accompanied by the deposit of the decree amount nor by the offer of any security. On the 9th April, however, there

*C.R.P. No. 2292 of 1941. 8th April, 1942.

Chatniyelan Kanna Kurup v. Raman Nayar

was a further affidavit in which certain property was offered as security to the Court in connection with the application to set aside the *ex parte* decree. The Court ordered notice to the decree-holder and also ordered the property offered as security to be tested. The result of the test was that the property was found to be sufficient and a report to this effect was received early in July. On the 21st July, however, the learned District Munsiff rejected the application of the petitioner on the ground that he had not complied with the provisions of section 17. It is against this order that the present revision petition has been filed.

It will be clear from this narrative of what has occurred that the learned District Munsiff was fully justified in saying that the petitioner had not strictly complied with the provisions of section 17. This section requires a previous application if the applicant is to be permitted to give security instead of depositing cash and admittedly no such previous application was filed. It is, however, argued, and argued with some force, that the practical effect of what the petitioner has done has been within the spirit of the section, and that all that the District Munsiff need have done was to have regarded the application to set aside the *ex parte* decree as having been filed not on the 7th April, but for instance on the 10th April, by which time the District Munsiff himself by ordering the property to be tested had in effect permitted the applicant to give security instead of depositing cash. This is not a violent legal fiction and in somewhat similar circumstances another legal fiction of the same kind has been resorted to by this Court in *Ramakrishna Nadar* v. *Ponnayya Thirumalai Vandaya Thevar*[1] followed in a judgment of my own reported in *Uthuman Pillai Tharagan* v. *Mohamed Usuf Tharaganar*.[2] There appears also to be some difference of opinion in the other High Courts as to the precise nature of the provisions of section 17. In *Murari Lal* v. *Mohammad Yasin*[3] and *Mohammad Ramzan Khan* v. *Khubi Khan*,[4] it has been held that these provisions are mandatory and that any failure to comply with them must result in the dismissal of the application. On the other hand, in *Qabul Singh* v. *Jai Prakash*,[5] it has been held that a narrow construction should not be placed upon the provisions.

I might in this case have been inclined to follow the latter view, especially as on the question of limitation there is no possible grievance which the decree-holder could put forward. But there has been a further argument on behalf of the respondent that in another respect the provisions of the section have not been complied with, and that is that even though the order of the Court permitting the giving of security may have been rightfully obtained subsequently to the filing of the application instead of before it, still no security has in fact been given within the

1. (1935) 69 M.L.J. 791.
2. (1939) 1 M.L.J. 738.
3. A.I.R. 1939 All. 46.
4. I.L.R. (1937) Lah. 728: A.I.R. 1938 Lah. 18.
5. I.L.R. (1939) All. 554.

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thirty days permitted by limitation for the filing of an application to set aside an *ex parte* decree. The facts are that a draft bond was put in within the thirty days and that the filing of a registered bond was postponed by the petitioner until the result of the testing of the draft bond should be made known. In the end as the petitioner's application was dismissed no registered bond was filed. It has been held by Ramesam, J., in a decision reported in *Balakrishna Aiyar* v. *Pichamuthu Pillai,*[1] a decision dealing with the same section of the Act as it then stood in 1922, that it was necessary that a registered bond should be filed within thirty days and that the mere filing of a draft bond was not sufficient compliance with the provision of the section requiring the giving of security. It is true that in other cases two learned Judges of this Court have construed the expression "furnish security" as equivalent to "tender security", Jackson, J., in 1927 in a case connected with the furnishing of security in order to obtain an order of stay and Happell, J., in C.R.P. No. 1511 of 1938 in a case dealing with Order 41, rule 10, Civil Procedure Code. There may be much to be said for this point of view, but it seems to me that I ought to follow the authority of *Balakrishna Aiyar* v. *Pichamuthu Pillai*[1] which deals directly with this section rather than the other cases which deal only with cognate provisions of law. Logically too it seems to me that the view of Ramesam, J., is right, because there is in section 17 an alternative given, and it is quite clear that in no circumstances can there be any deposit of the decree amount at any time later than thirty days. It seems logical therefore to assume that if the decree amount must be deposited within that time something effectual must be done within that time in the matter of giving security. If the expression "give security" be analysed, it cannot be seriously argued that the mere production in Court of a piece of paper with a memorandum of property upon it affords either the Court or the decree-holder any kind of security whatever. In these circumstances I can see no sufficient reason for interfering with the order of the District Munsiff.

In the result this petition must fail and is dismissed with costs.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Edara Venkata Rao .. *Appellant** (*Plff.*)

v.

Edara Venkayya .. *Respondent* (*Deft.*).

Venkata Rao *v.* Venkayya.

Civil Procedure Code (V of 1908), section 100 (1) (c)—Scope—Finding of fact against appellant—Lower appellate Court requiring a standard of proof higher than that laid down by the Evidence Act—Interference.

Tort—Joint tortfeasors—Liability for damages—Right of contribution by one against other—Rule in Merryweather *v.* Nixan *not applicable in India.*

1. (1921) 15 L.W. 186.

*S.A. No. 296 of 1938. 26th February, 1942.

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Where a lower appellate Court required a standard of proof higher than that laid down by the Evidence Act that was an error of law or procedure which would justify interference under section 100 (1) (c) of the Code of Civil Procedure even though the finding of fact is against the appellant.

Prakasarao Naidu v. *Ramamurti Naidu,* 1937 M.W.N. 188, followed.

The rule in *Merryweather* v. *Nixan,* (1799) 8 T.R. 186: 101 E.R. 1337 is not applicable in India and there is no legal impediment to the granting of a decree to a tortfeasor who sues for contribution against a joint tortfeasor for damages recovered from himself.

Decision in *Yegnanarayana* v. *Yagannadha Rao,* A.I.R. 1932 Mad. 1, not followed.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Ellore in A.S. No. 27 of 1937 preferred against the decree of the Court of the District Munsiff of Ellore in O.S. No. 826 of 1932.

V. Govindarajachari and *B. V. Ramanarasu* for Appellant.

M. S. Ramachandra Rao for Respondent.

The Court made the following

ORDER.—This is a suit for contribution by one brother against another which was dismissed by the Additional District Munsiff of Ellore whose decree was confirmed by the Principal Subordinate Judge of Ellore in appeal. The plaintiff has filed this second appeal in the High Court and the first point which requires decision is whether there is any right of appeal under section 100 in the circumstances of the case.

A great deal of the controversy in the Courts below centered round the date at which two parts of a particular book were published. The two brothers who had been publishing books as a firm entered into a partition on 15th April, 1928, and one of the terms of that partition was to throw upon both of them any losses or difficulties which should result from any of their business carried on prior to the 22nd of March. If therefore the books in question were published after the 22nd March, this clause will not relate to them and plaintiff's case must necessarily fail. Plaintiff however relies upon Nos. 41 and 45 in the list of books in Sch. D to the partition deed and says that they relate to the books now in question, which therefore must have been published before the partition. Plaintiff's case was accepted by the learned District Munsiff on this point, but has not been accepted by the learned Subordinate Judge. In his discussion of the evidence, the learned Subordinate Judge relies upon a letter written by plaintiff himself in which he referred to the actual preparation of the books as having taken place in May, 1928 and to this letter the learned Subordinate Judge attached a very great importance. On the other hand, the learned Judge has entirely ignored the very important documents (Exs. N and N-1) which are printer's bills and are said by the plaintiff to relate to these books. Further, the learned Subordinate Judge has lightly dismissed the fact that the defendant has failed to prove that the actual books referred to in the partition deed were not the books which are the subject-matter of this suit. What the learned Subordinate Judge says is this:

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> "I do not think that the lower Court was justified in inferring that these entries Exs. A-1 and A-2 relate to the books Exs. B and B-1, simply because the defendant has failed to prove that they relate to some other books."

The learned Judge goes on to say:

> "From the evidence that has been let in, I am inclined to think that Exs. A-1 and A-2 do not conclusively go to show that they refer to Exs. B and B-1."

It seems to me that in this manner of appreciating the evidence the learned Subordinate Judge has misdirected himself. This is not a criminal case in which the benefit of every reasonable doubt must necessarily go to the defendant. The fact that the defendant has failed to prove a positive case which is intended to rebut the case of the plaintiff must be given its due weight, and the learned Subordinate Judge is not entitled to require from any party conclusive proof of any fact. As has been pointed out in a previous judgment of my own in *Prakasarao Naidu* v. *Ramamurti Naidu*,[1] where a lower appellate Court required a standard of proof higher than that laid down by the Evidence Act that was an error of law or procedure which would justify interference under section 100 (1) (c) of the Code of Civil Procedure. I am accordingly of opinion that I am entitled to interfere in this case even though the finding of fact is against the appellant. The whole of the evidence has not been produced before me and I do not wish to make any further criticism of the way in which it has been considered by the learned Subordinate Judge as I propose instead of deciding this issue of fact myself to call for a finding from the lower appellate Court. This finding must be submitted within one month of the reopening of the Subordinate Court of Ellore after the vacation and must be upon issue I alone of the issues framed by the District Munsiff, and no further evidence can be allowed; time for objections ten days.

In pursuance of the above order of the High Court the Principal Subordinate Judge of Ellore submitted the following

FINDING:— * * * * *

The case coming on for final hearing after the receipt of the finding the Court delivered the following judgment:—This appeal arises out of a suit brought by the plaintiff against his brother for contribution. The plaintiff and his brother were members of a joint family. They entered into a partition in April, 1928, when they were jointly carrying on the business of publishing books and amongst the books which they had decided to publish was the "English Primer" to be published in two parts. This Primer was originally written by one Mr. S. V. Thomas and the undisputed fact of this case is that the two brothers decided that it should be revised by one Mr. Srinivasa Rao. When this appeal first came on for hearing before me in April, 1941, there was no clear indication in the judgments of the Courts below as to the precise date of the publication of this English Primer and the appeal was remanded to the learned

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1. 1937 M.W.N. 189.

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Subordinate Judge of Ellore for a finding on this point. He has submitted a finding which shows that Part I of the Primer was published before the date referred to in the partition deed and Part II after that date. The publication undoubtedly constituted an infringement of the copyright possessed by the widow of the original author of the book and when she took criminal proceedings against the plaintiff, the plaintiff was advised legally to compound the claim, and accordingly he paid a certain sum to the widow of Mr. Thomas and the prosecution was withdrawn. He has now sued his brother, the defendant, for recovery of one half of the money which he, thus, paid over to the widow of Mr. Thomas.

The first question which arises in this case is whether the terms of the partition agreement between the two brothers permit of this claim being made. The partition agreement recites

> "that if in respect of any transactions, which took place prior to the 22nd March, 1928, any loss has been sustained in connection with Rama & Company or Venkatrama & Company, such losses and difficulties shall be borne by both of us."

The question then is whether the payment which was made to the widow of Mr. Thomas was a loss occasioned by a transaction which took place before the 22nd March, 1928. As already indicated the finding now submitted by the learned Subordinate Judge is that the final act in the transaction, namely the publication of the English Primer took place partly before and partly after the 22nd March. But the learned Subordinate Judge has indicated that it is his opinion that in spite of the fact that Part II was not published until after that date the publication of both the parts falls within the meaning of this clause. It seems to me that this opinion is the correct one. The intention of the parties must have been that both should be liable to meet any losses which were occasioned by the joint acts of both, that is to say the transactions which took place while they were in partnership and before the partition. The 'transaction' in the present case cannot be restricted to the final publication of the book. It must obviously include the negotiations with Mr. Srinivasa Rao by which the firm had decided that the books should be published. It was those negotiations which were the real cause of the incurring of this expense by the plaintiff, for but for these negotiations the plaintiff would not have published Part I or Part II and even if the plaintiff had thought over his position and had decided not to publish either the one part or the other there would still have been a loss arising from the fact that they had necessarily to make some payment to Mr. Srinivasa Rao for a book which they were no longer able to publish. It is clear therefore that any loss which was incurred in connection with the whole of the transaction of printing and publishing this book owed its origin to events which took place before the 22nd March, 1928, and therefore under the terms of the partition agreement the loss must be borne equally by both brothers.

It only remains to consider the plea on behalf of the defendant that the payment to Mrs. Thomas was occasioned by the commission of a tort and that where a suit for contribution is brought

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by one tortfeasor against another, the rule in *Merryweather* v. *Nixan*,[1] should be applied and no relief should be granted. There is no clear finding by the learned Subordinate Judge who decided this case in appeal on the question whether the plaintiff and the defendant were joint tortfeasors, although he appears to incline to the opinion that if any tort had been committed, it was committed only by the plaintiff himself. It is unnecessary for me to come to any distinct finding, but it seems to me clear that if any tort was committed it was the joint action of both parties and that the learned Subordinate Judge had no justification for differentiating between the position of the plaintiff and the defendant in this respect.

On the question of law, however, I am unable to accede to the contention for the respondent that the rule in *Merryweather* v. *Nixan*[1] should be applied in this country. In England the universal application of the rule had long been questioned and finally in 1935, a new Act was passed which made the rule in *Merryweather* v. *Nixan*,[1] no longer good law and no longer enforceable in the English Courts. It is only if I were bound by any authority in this country to apply the rule that I would think of doing so and it is conceded by the learned advocate for the respondent that the only authority which he can produce in favour of the application of the rule to a case in this country is one by a single Judge of this Court. I am not, with respect, prepared to follow that ruling or to apply the rule in *Merryweather* v. *Nixan*[1] to any case. There is, therefore, no legal impediment to the granting of a decree to the plaintiff.

The decrees of the Courts below will, therefore, be set aside and this appeal allowed granting to the plaintiff a decree for the sum of Rs. 363-11-9 with interest at 6 per cent. from the date of the plaint to the date of realisation. The parties will give and take proportionate costs throughout.

Leave is refused.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE ABDUR RAHMAN.

M. Krishnaswami Naidu .. *Appellant** (1*st Defendant*)

v.

The Right Honourable the Secretary of State for India in Council represented by the Collector of Tanjore and others .. *Respondents* (*Plff. and Defts. Nos.* 2, 3 *and* 7 *to* 9).

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*Escheat—Crown's claim to property—Assertion of non-existence of other heirs—Onus of proof—*Prima facie *proof of negative fact—Sufficiency—Civil Procedure Code (V of* 1908)*, Order* 41, *rule* 22*—Cross-objections—Right of filing against party to suit not impleaded in appeal—Property belonging to neither of the parties to the suit but to a* math *which has no scheme of management—Suitable order for its administration in the circumstances.*

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1. (1799) 8 T.R. 186: 101 E.R. 1337.

*Appeals Nos. 163, 329 of 1938, and 37 of 1939. 30th October, 1941.

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In cases where the Crown's title to get a property rests not in possessing any special qualification but in the assertion that no other preferential claimant was in existence at the time of the last owner's death, the onus of proving such fact would lie on the Crown. Since it is a negative fact that has got to be established *prima facie* proof of such non-existence will be enough. The proof must be of such a character as to put the matter beyond all reasonable doubt and of such a nature as may shift the burden of proof on to the defendant to rebut the evidence adduced on behalf of the plaintiff, which if not rebutted would entitle the latter to the relief asked for.

The provisions of Order 41, rule 22, Civil Procedure Code, cannot be read as precluding a respondent from filing cross-objections, where the objections intended to be filed are directed not against the appellant but against one of the parties to the suit who are not made parties to the appeal.

Venkata Narasimha Rao v. *Krishnabayamma*, A.I.R. 1929 Mad. 479 and *Sabiri Begam* v. *Radha Kishan*, (1934) I.L.R. 57 All. 580, not followed.

Where the Crown's claim to take property by escheat is negatived as also the title of the defendant thereto and the property is found to belong to a math brought into existence by the deceased, the appropriate order to pass in the circumstances will be to appoint a receiver to remain in possession of the property and run the institution on the lines on which it had been run till a scheme is framed by the Hindu Religious Endowments Board for its administration.

Appeals against the decree of the Court of the Subordinate Judge of Tanjore, dated 29th January, 1938 and passed in O.S. No. 26 of 1932, etc.

K. Rajah Aiyar and *R. Ekambaram* for Appellants in Appeals Nos. 163 of 1938 and 37 of 1939.

N. Sivaswami for Appellant in Appeal No. 329 of 1938.

The Government Pleader (*K. Kuttikrishna Menon*), *R. Rajagopala Aiyangar* and *K. V. Srinivasa Aiyar* for Respondents in Appeal No. 163 of 1938.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent in the other appeals.

The Judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.: *Appeals Nos.* 163 *of* 1938 *and* 37 *of* 1939.—These are two connected appeals. They arise out of two cross suits one of which O.S. No. 26 of 1932 was brought on behalf of the Secretary of State for India in Council against one Krishnaswami Naidu and others and the other O.S. No. 57 of 1932 by Krishnaswami Naidu against the Secretary of State for India in Council to which some of the defendants in the first suit were also impleaded and a decree either in the plaintiff's favour individually or jointly with the other defendants was asked for. The suit on behalf of the Secretary of State for India was instituted first and the whole of the evidence, documentary and oral, on which both the suits were decided was produced in this case, the judgment in the other suit merely recording the findings arrived at in O.S. No. 26 of 1932.

O.S. No. 26 of 1932 was instituted on behalf of the Secretary of State for India in Council for a declaration that the properties described in the schedule appended to the plaint which belonged to one Viralimalai Sadasiva Swamigal, a Sudra ascetic who resided in Tirupavanam in the Kumbakonam taluk and died on the 5th December, 1926, without leaving any heirs, had

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devolved on the Government by escheat. It also contained a prayer for delivery of possession of such of the items of property as happened to be under the control of the various defendants. A decree for past and future mesne profits was also asked for.

The only case put forward on behalf of the Secretary of State for India in Council in the plaint as to the title under which the Swamigal held the items 1, 2 and 3 mentioned in the plaint schedule, which form the subject-matter of the present appeal, was that he had been in possession of them as owner for more than twelve years although an attempt was made while the suit was going on to clothe the Swami with a title under a gift made in his favour by defendants 1 to 3. This suit was contested by the first defendant as also by defendants 2 and 3. The other defendants also contested the suit but in so far as they have not appealed against the decree passed against them, it is unnecessary to consider their defences now.

The first defendant denied the allegations that the Swamigal had owned or dealt with these properties in that capacity. The first of these properties is a building that was alleged to have been constructed by the first defendant with the aid of family funds in honour of the Swamigal for the propagation of his cult and for the worship of the deity to be installed on the sacred remains of the Swamigal after he attained perpetual *samadhi* but it was alleged that before this building came into existence, a cattle trough and water pandal and bhajana mutt had been in existence in the south-west corner of the premises and a portrait of Rama was installed therein and bhajana and worship were being regularly conducted there. It was not denied that the Swamigal, during his lifetime, was permitted by the first defendant and his brothers to stay there and perform his yogic *nishtai* and that immediately after his interment, a *Sivalingam* was set up over the *samadhi*, a *balipeetam* and *nandi* were installed in front after they were duly consecrated and that daily worship and annual *gurupuja* had been conducted ever since. The other two items consist of wet and dry lands. They were alleged to have belonged to and to have been in the exclusive possession and enjoyment of the first defendant and that of his son Chittukutti, his brother Jayaram Naidu, his uncle's son Balasundaram Naidu and the members of their families. The defendant in the alternative claimed that even if the aforesaid allegations were not found to be established, the suit was liable to be dismissed as the first defendant had inherited these properties as the chief disciple of the said Swamigal according to law and long established custom among the Tamils and was in any case entitled to remain in possession as a founder and entitled to management of the same. Paragraph 5 of the plaint which contained the ground on which the suit was brought and which therefore contained the allegations that the Swamigal had died without leaving any heirs or blood relations or *sishyas* was specifically denied and formed the subject-matter of a separate issue (Issue 3).

The learned Subordinate Judge of Tanjore found the Swamigal's title to all the three items of property established on

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account of prescription although the validity of the gift on which some reliance was placed on behalf of the Secretary of State for India during the trial was found against both on the ground of want of registration, and of the absence of proof as to the financial condition of the family, and, therefore, of its being within the competence of its manager. As the Swami was found to be the owner of the aforesaid three items of property and to have died without leaving any heirs or blood relations or *sishyas,* the suit instituted on behalf of the Secretary of State was decreed and the one brought by the first defendant dismissed. This decision has given rise to the two appeals which are now before us for disposal.

As the suit was instituted by the plaintiff on the ground that the property had devolved on the Government by escheat, it has first to be ascertained whether the necessary requisites for the establishment of that title have been made out. And both because the plaintiff has come to Court to enforce a right dependent on the existence of certain facts asserted by him and because he would fail if no evidence were adduced on either side, the burden of proving such facts lies on him regardless of the question whether the allegation made by him is affirmative in character or a negative one. If a party wishes the Court to believe in the non-existence of certain facts and the existence of the rights asserted by him depends on the non-existence of such facts, it is as much his duty to establish those negative facts as it would be of proving positive facts, if his rights were to depend on their existence. The distinctions between the denial of an affirmative allegation and the assertion of a negative fact and between the proof of the existence or non-existence of a fact and disproof of its existence or non-existence are obvious and should not be lost sight of. There is however no doubt that the degree of proof in regard to affirmative and negative facts must be, in the nature of things, different although in either case the Court has "after considering the matters before it", to make up its mind whether it does or does not believe in the existence or non-existence of a fact which has to be established or considers its existence or non-existence "so probable that a prudent man ought, under the circumstances of the particular case, to act under the supposition that it exists" or does not exist. When an affirmative fact is to be established, direct evidence to prove that fact can be adduced and the Court has to make up its mind as to its credibility and sufficiency; but when a negative fact has to be proved, it may be that in a large number of cases no more than *prima facie* evidence as to the non-existence of the fact that is alleged not to have existed is available or can be adduced and in such cases, a plaintiff can be expected to do nothing more than produce such evidence to substantiate his allegations *prima facie.*

In cases where the Crown's title to get a property rests not in possessing any special qualification (barring of course of its being the sovereign which is, in this case not disputed and is in fact indisputable), but in the assertion that no other preferential claimant was in existence at the time of the last owner's death, the onus of proving that no such person was in existence

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would lie on the plaintiff and since a negative fact has to be established by him, the *prima facie* proof of such non-existence would be obviously enough. But that proof must be of such a character that firstly it may put the matter beyond any reasonable doubt, thereby discharging the *onus probandi* and secondly of such a nature as may shift the burden of proof on to the defendant to rebut the evidence adduced on behalf of the plaintiff which, if not rebutted, would entitle the latter to the relief he has asked for.

In dealing with the law of devolution of property by escheat, their Lordships of the Judicial Committee observed in *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*[1] as follows:

"According to the law administered by the Provincial Courts of British India, on the death of any owner, being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindus and Mahomedans' by positive regulation; in other cases it rests upon the course of judicial decisions. But when it is made out clearly that by the law applicable to the last owner, there is a total failure of heirs, then the claim to the land ceases (we apprehend) to be subject to any such personal law; and as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all the Courts of the country alike. Private ownership not existing, the State must be owner as ultimate Lord. Consequently, the claim of the Government, in the present instance, might have been considered with reference to this principle."

In a second case to which our attention was drawn, the Lord Chief Baron of the Exchequer is stated to have observed to the following effect during the course of the arguments in *Gridhari Lall Roy* v. *The Bengal Government*:[2]

"In this country in a Writ of intrusion, or ejectment, the Crown must, to take lands by escheat, prove that there was an entire failure of heirs, and so also a Lord of a Manor with respect to Copyholds on the death of a tenant without heirs, and cannot rely on the want of title of the party in possession. The Government must show a good title. Here they have shown none."

And in delivering the decision of the Board, Sir James Colvile while reversing the decree of the High Court of Calcutta observed at page 469:

"The respondent, therefore, was in the position of a plaintiff in an ordinary suit in the nature of an ejectment. The Government could only recover by the strength of their own title. Accordingly, it lay upon the plaintiff to prove, at least *prima facie*, that Woopendro Chunder Roy died without heirs; and, on the other hand, the appellant was entitled to defend his possession not only by proof of his own title, but by setting up any *jus tertii* that might exist. By an alternative plea he did set up such a bar to the respondent's suit; and the title of those persons who, he says, are, failing himself, the heirs to Woopendro Chunder Roy, has never yet been determined. The decree under appeal would remit the cause to the Judge, in order to allow those persons who, according to the practice in India, have intervened as objectors to litigate their title with Government, casting apparently, the burden of proof on them. But it seems to deprive the appellant of his right to defend his possession, on the ground of an existing *jus tertii.*"

1. (1860) 8 M.I.A. 500 at 525.
2. (1868) 12 M.I.A. 448.

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These decisions were followed by this Court in *The Secretary of State for India in Council* v. *Subraya Karantha*[1] and *Kesar Singh* v. *The Secretary of State for India in Council*[2] and by the Bombay High Court in *Ganpat Rama Joshi* v. *The Secretary of State for India in Council.*[3] The decisions in *Doe* v. *Griffin,*[4] *Greaves* v. *Greenwood,*[5] *Mt. Chunna Kunwar* v. *Lala Mukat Behari Lal,*[6] *Rama Rao* v. *Kuttiya Goundan,*[7] although not in respect of a claim by the Government by escheat, lead to the same conclusion.

Learned counsel for the respondent relied on the decision in *Secretary of State* v. *Dugappa Bhandary.*[8] But we find nothing in that judgment which lays down the law any differently. In fact, it follows the decision in *Gridhari Lall Roy* v. *The Bengal Government,*[9] although according to the circumstances established in the *Secretary of State* v. *Dugappa Bhandary,*[8] the learned Judges held the onus of proof, initially and correctly placed on the Government, to have been discharged.

The question therefore to decide is if the Government has succeeded in establishing, even *prima facie,* that the Swamigal had died without leaving any heirs that could have succeeded to his property before it could be claimed by the Crown. The evidence adduced on behalf of the plaintiff is extremely meagre and unconvincing. The learned Subordinate Judge held that the Swamigal was not governed by any special rules of succession and as he was found to have died intestate and there was no evidence on the record that he had left any blood relations (*vide* para. 91 of the judgment), the third issue was decided in favour of the plaintiff only because during the interval of six years (*i.e.,* between 1926 when the Swamigal died and 1932 when the present suit was instituted), no relation of *sishya* had come forward to claim his estate. Learned counsel for the respondent wished to rely before us in addition on the notifications published in the Tanjore District Gazette calling for claims to the properties which were, according to the Divisional officers, under whose directions the notifications were published, liable to escheat to the Government. But neither of these two circumstances is enough in our opinion to discharge the *onus probandi* that lay on the plaintiff. The lapse of a period of six years is not sufficient to draw the conclusion that the Swamigal had left no heirs. Nor is the publication in the local gazette in Tanjore, to which place the Swamigal did not originally belong, enough to presume that the Swamigal's relations, if any, must have come to know of his death or of the Government's notice asking for claims to his estate.

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1. 1915 M.W.N. 962.
2. (1926) 51 M.L.J. 16: I.L.R. 49 Mad. 652 at 668.
3. (1920) I.L.R. 45 Bom. 1106.
4. (1812) 15 East. 293: 104 E.R. 855.
5. (1877) L.R. 2 Ex.D. 289.
6. A.I.R. 1934 All. 117.
7. (1916) 30 M.L.J. 514: I.L.R. 40 Mad. 654.
8. A.I.R. 1926 Mad. 921.
9. (1868) 12 M.I.A. 448.

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As to the oral evidence, the less said the better. P.W. 1 who in his examination in chief deposed to the fact that the Swamigal had left no heirs or *sishyas* had to admit in his cross-examination that he did not know where the Swamigal was born or who his parents were. He does not profess to know any of the Swamigal's relations. P.W. 4 stated in his cross-examination that he was not acquainted with the Swamigal and did not know if any relations of his were alive. P.W. 5 stated that the Swamiyar had left no heirs as according to the witness he had no disciple. P.W. 8 did not state that the Swamigal had left no heirs and denied having any knowledge of the place or of the parents to whom he was born. This is the whole of the evidence adduced on behalf of the plaintiff and it is impossible for us to come to the conclusion on this evidence that the plaintiff had succeeded in establishing that the Swamigal had died leaving no heirs.

This is enough to dismiss the plaintiff's suit. But inasmuch as two other questions were debated before us by learned counsel for the parties on which the decision of the Court was expressly invited, it would be better to dispose of them as well. These questions were:

(1) Whether the properties in suit were not bequeathed to the Swami personally by means of two gifts but were endowed to the math or asram which had come into existence and the Swami had, as alleged by the defendants, intended to take them for the purpose of the math?

(2) Whether the first defendant was a *sishya* or disciple of the Swami and was entitled to succeed to him in preference to the Crown?

As to the first question it has to be remembered that we are dealing with a Swami who, according to the common case of the parties, was an ascetic. Moreover, the witnesses produced on behalf of the plaintiff described the first item of property to be a matam and admitted that the Swami was buried in it and that a *Sivalingam* had been installed over his tomb. It was not denied that the *gurupuja* was performed in that building every year and that feeding took place on every *Dwadasi day.* It was also admitted by P.W. 4 that one Sundaresa Aiyar lived in the matam and had been performing the puja both during the lifetime of the Swami and after his death. Even before the present building came into existence there used to be a bhajana matam with the picture of Rama and puja used to be performed in it. It is true that according to the inscription, Ex. A, the property was said to have been donated to Sadasivaswami who was authorised to hold and enjoy the said property with all rights and according to the inscription Ex. A-1, the other two properties were said to have been set apart for "the expenses of puja, *deepam* and establishment charges" for the Swami at the Samadhi Asram that was "built and endowed for the said Swami"; but these exhibits do not comply with the provisions of section 123 of the Transfer of Property Act or of section 17 of the Registration Act and cannot be, for that reason, admitted in evidence to

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prove the gifts in favour of the Swami but may be referred to for the collateral purpose of ascertaining the nature of his possession.

The facts that the work of building and repairing is referred to in Ex. A as 'tiruppani', the compound wall of the Asram as 'tirumadil', the building in the first item of property referred to as 'hermitage buildings and the other two properties in Ex. A-1 as having been set apart for the expenses of puja, *deepam* and establishment charges of the Swami at the Samadhi Asram and the gift of these properties was said to have been made for Swami puja, etc., lead us to conclude without any difficulty that the object of the donor was to erect and maintain a math and the property was endowed for the maintenance of the math and that not being the property of the Swami he was holding it for the benefit of the institution. It was contended by the learned counsel for the respondent that there was no math in existence before and the first item of property was constructed before the *bhajana matam* was commenced or even before the picture of Rama was placed therein but these objections cannot anyhow be raised in regard to the other two items of property which were endowed with the object of carrying on the work in the first item of property. As for the first item of property, the intention to endow it as a math was clearly indicated by the very nature of the building and by the purpose for which it was constructed and is fully corroborated by the use to which the building was and has been put after its completion. The property was brought into existence with the manifest intention of the Swami performing his yogic *nishtai* and for the advancement of his spiritual teachings. A Sivalingam was set up over his *samadhi*, a *balipeetam* and *nandi* were installed after they were duly consecrated soon after his interment in the space provided in the building from the beginning and a daily worship and annual *gurupuja* have been conducted there ever since. If the Swami cannot be said to have acquired these items of property for himself which, in our opinion, he cannot be said to have done, there can be no question of his having been in adverse possession of the property for his own benefit during his lifetime.

The validity of the gifts on behalf of the defendants was also attacked on the ground that the first defendant who was the manager of the joint family had no power to make a gift of the property belonging to the family as the family was not rich enough and the gift to the extent of the property to which it was made could not therefore be upheld. The lower Court upheld that contention for there was no reliable evidence to show the total extent of the family estate or of its income and the proportion that the properties handed over to the Swamigal bore to the entire estate owned by the family. This was because the onus of establishing that the gift by a manager of a joint family to the Swami was not in excess of the extent to which it could have been validly made was held to lie on the plaintiff. It seems to be doubtful but it is unnecessary, in this case, to decide whether the onus was, in view of the fact that the defendants were actually in the know of the financial condition of the family and

of its possessions, rightly laid on the plaintiff. But the fact remains that the family did not continue to remain in possession of the properties in dispute and that the Swami was in possession of the same although not for himself or for his own benefit but for the benefit of the math. If the math was in possession of the property through the Swami as of right for over twelve years, the title would be, as against all the persons including the defendants to the suit, complete and the property would thus come to vest in and belong to the math. We are thus of opinion that all the three items of property belong to the math. We are confirmed in this conclusion by the conduct of the first and other defendants in relation to these properties and even by the claim which was, at any rate, made by one of them as a *sishya* of the Swami.

As for the second question, we have been taken through the evidence and having regard to the unsatisfactory nature of the defendants' evidence, we find ourselves in complete accord with the trial Judge's finding that the first defendant has not succeeded in establishing that he was a *sishya* and could not, therefore, be held entitled to succeed to these properties in his capacity as such.

The question then is as to what order should be passed under the circumstances. The plaintiff's suit has to fail as all the three items of property have been found to belong to the math that was brought into existence by the Swami and because he has failed to establish that the Swami had died leaving any personal property of his own without any heirs or *sishyas*. The first defendant's suit has to be dismissed and his title to remain in possession of the property has to be negatived as the property is found to be no longer his or that of the joint family and he is not found to be a *sishya*.

We think the only suitable order that we might pass in the circumstances is to appoint a receiver who would remain in possession of the property and to run the institution on the lines that it had been run so far until a scheme is framed by the Madras Hindu Religious Endowments Board whom we direct to take proceedings for framing a scheme for the proper administration of the math and of its properties. The receiver will remain in possession of the property until that time and will submit six-monthly accounts to the trial Court. After a scheme has been framed by a competent authority, the possession of all the properties belonging to the math and of any money that may be in his possession will be delivered by him to such person or persons as may be appointed under the scheme to take possession of the institution and of its properties. The appointment of the person who is to function as such and the terms on which he is to be appointed are being left to the trial Court after hearing the parties to the suit. We may state that the learned Government pleader on behalf of the Government stated that in case we are against the Government and declare also that a valid religious trust has been created, the Government would surrender the movable property and the immovable property other than

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items 1 to 3 herein which were decreed to them for the trust. We do not wish to suggest that the first defendant may be appointed as a receiver but we do wish to make it clear that nothing which we have said in this judgment would debar him or the members of his family from submitting their claims to the appointment of that office. They were at one time the owners of the property and had it not been for their munificence, this charity would not have come into existence. Appeal No. 163 of 1938 is accordingly accepted and Appeal No. 37 of 1939 dismissed. But having regard to the special circumstances of this case, we leave the parties to bear their own costs throughout.

In the circumstances we are not called upon to consider the right of a disciple or of a *sishya* to inherit his guru's property on account of mystic relationship existing between them. The decisions in *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar*,[1] *Sambasivam Pillai* v. *The Secretary of State for India in Council*[2] and *Baba Kartar Singh Bedi* v. *Dayal Das*,[3] and also the observations in regard to succession of the disciple or a fellow student at page 120 of Saraswathi Vilasa by Foulkes need not therefore be considered.

Cross-objections were filed on behalf of the Government in regard to item 7 of the plaint property against defendants 7 to 9. They were not impleaded by the 1st defendant in Appeals Nos. 163 of 1938 and 37 of 1939 but were added at the instance of the plaintiff as parties by an order of this Court, dated the 24th July, 1939, in C.M.P. No. 1667 of 1939. Learned counsel for these respondents objects that in so far as his clients were not impleaded in the main appeals, it was not open to the Secretary of State to file these objections under Order 41, rule 22, Civil Procedure Code, particularly when there was nothing in common between them and the appellants as to the reliefs claimed by the Secretary of State. Reliance was placed by him in this connection on a decision of Curgenven, J., in *Venkata Narasimha Rao* v. *Krishnabayamma*,[4] where it was held that if *A* did not file an appeal against *B*, not himself an appellant and the time for so doing had expired, the former, *i.e.*, *A* could not have *B* added for the purpose of filing memorandum of objections although the appellate Court may have, upon very unusual grounds, jurisdiction to do so. To more or less the same effect is the decision of the Allahabad High Court in *Sabiri Begam* v. *Radha Kishan*,[5] but with the exception that a cross-objection would not be incompetent, according to the learned Judges who decided that case, where there is a community of interest between the appellant and a co-respondent against whom they are proposed to be filed. One of us sitting alone has taken a different view in *Guzulu Devendra Aiyar* v. *Muthu Chettiar*[6]

1. (1914) 27 M.L.J. 333: L.R. 41 I.A. 290: I.L.R. 42 Cal. 384 (P.C.).
2. (1921) 41 M.L.J. 109: I.L.R. 44 Mad. 704.
3. A.I.R. 1939 P.C. 201: I.L.R. (1939) Kar. 350 (P.C.).
4. A.I.R. 1929 Mad. 479.
5. (1934) I.L.R. 57 All. 580.
6. A.I.R. 1938 Mad. 329.

and having regard to the words of the rule, we are not prepared, with great deference to the learned Judges who decided the two cases cited above, to negative the right of a respondent to file cross-objections against another co-respondent either wholly or even partially. If a respondent although "he may not have appealed from any part of the decree," is not only authorised under the terms of that rule to "support the decree on any of the grounds decided against him in the Court below" but also to "take any cross-objections to the decree which he could have taken by way of appeal," what does it matter whether the cross-objections which he intended to file are not directed against the appellant but against one of the parties to the suit who were not made parties to the appeal? If he could get his grievance existing against a decree redressed by filing an appeal against a party to the suit, he can do the same by way of cross-objections as well although they do not happen to be directed against an appellant or happen to be directed against a party to the suit, whether that party might or might not have been added as a party to the appeal. While it may be possible to defend the view taken by Curgenven, J., in *Venkata Narasimha Rao* v. *Krishnabayamma*[1] on the ground that if a decree has become final in favour of a party by the failure of an appeal having been preferred against it within the period prescribed by law and should not for that reason be permitted to be attacked by a respondent who did not choose to file an appeal against it, it is not easy to agree with the Allahabad decision as to the maintainability of a cross-objection only in cases where there is a community of interest between the appellant and a respondent who has not been impleaded as a party and the time for preferring an appeal against him has expired. As to the view taken by Curgenven, J., which as we have already observed is the more logical of the two, our difficulty in accepting it arises on account of the general words used by the legislature in Order 41, rule 22, Civil Procedure Code. While this rule entitles a respondent to file objections in cases where he could have filed an appeal, Curgenven, J., would introduce a restriction and suggest that it is not open to him to do so, if the party against whom he intends to file objections was not impleaded by the appellant or had not, in any case, come on the record before the period of appeal against him had expired. To read the words of the rule in such a way would be tantamount to adding something to a statute which we are not authorised to do. We would, therefore, overrule the objection raised on behalf of defendants 7 to 9 that these cross-objections were not competent. But having regard to our finding in the main appeal that the Secretary of State has failed to establish his title, they must be dismissed on the same grounds on which Appeal No. 163 of 1938 has been accepted. Having regard to the circumstances, however, we would leave the parties to bear their own costs.

Appeal No. 329 *of* 1938:—This appeal was filed by the 5th defendant on the ground that a decree for accounts should not have been passed against him when the 6th defendant was

1. A.I.R. 1929 Mad. 479.

Krishnaswami Naidu *v.* Secretary of State for India.

Abdur Rahman, J

found to have been in possession and management of items 5, 6 and 8 of the property as an agent and on behalf of the Swami. Since we have come to the finding that the plaintiff has failed to establish his title to any of the properties in suit, this appeal must also be accepted. But having regard to the circumstances of the case, we would do so without allowing any costs to the appellant. The decree of the lower Court ordering the appellant to render accounts is vacated.

We direct a copy of this Judgment to be sent to the President, Madras Hindu Religious Endowments Board, for taking the necessary action for framing a scheme for the math.

Appeals Nos. 163 *of* 1938 *and* 329 *of* 1938 *allowed. Appeal No:* 37 *of* 1939 *dismissed.*

K.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

Yalpi Virupakshappa .. *Appellant** (1*st Deft.*)

v.

Chowdireddi Veerabhadra Gowd and others .. *Respondents* (*Plff. and* 2*nd and* 3*rd Defts.*).

Virupakshappa *v.* Veerabhadra Gowd.

Limitation Act (IX of 1908), *section* 14—*Applicability—Suit under Order* 21, *rule* 63, *Civil Procedure Code—Withdrawal with liberty to bring fresh suit—Judge expressing opinion about limitation—Fresh suit filed out of time—Bar of limitation—Whether can be pleaded—Civil Procedure Code,* 1908, *Order* 23, *rules* 1 *and* 2—*Defendant accepting costs awarded in prior suit—Whether estopped from pleading limitation.*

A defeated claimant instituted a suit under Order 21, rule 63, Civil Procedure Code, to establish his title. When the suit came on for hearing he realised that he could not succeed without a prayer for possession and applied for leave to amend his plaint in this respect. The leave to amend was refused, but the Judge allowed the plaintiff to withdraw his suit with liberty to file a fresh suit under Order 23, rule 1, Civil Procedure Code and directed him to pay half the costs to the defendant. At the same time the Judge expressed his opinion that section 14 of the Limitation Act would apply to the case and that the plea of limitation should not prejudice his filing a fresh suit. The plaintiff subsequently paid the costs awarded to the defendant and filed a fresh suit which in point of time was more than twelve months after the date of the dismissal of the claim petition.

Held, that section 14 of the Limitation Act was inapplicable to the case and the suit was time-barred. The fact that the Judge had at the time of the withdrawal of the previous suit expressed an opinion against the bar of limitation would not prevent the defendant from raising the point of limitation in the later suit in view of the language of Order 23, rule 2, Civil Procedure Code.

Arunachellam Chettiar v. *Lakshmana Aiyar,* (1915) 29 M.L.J. 569: I.L.R. 39 Mad. 936 and *Sadayatan Pande* v. *Ram Chandra Gopal,* (1934) I.L.R. 57 All. 145 (F.B.), relied on.

Held, further, that the defendant was not estopped from raising the question of limitation merely because he accepted the costs which were awarded to him in the first suit.

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*S.A. No. 729 of 1939. 16th March, 1942.

Virupakshappa v. Veerabhadra Gowd.

Appeal against the decree of the District Court of Bellary in A.S. No. 20 of 1936 preferred against the decree of the Court of the District Munsiff of Bellary in O.S. No. 880 of 1934.

B. Sitarama Rao and *Kasturi Seshagiri Rao* for Appellant.

V. S. Narasimhachar for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant obtained a money decree against the 2nd and 3rd respondents in the Court of the District Munsiff of Bellary. In execution of that decree he attached certain immovable properties. The 1st respondent applied for an order removing the attachment on the ground that the properties were his. His application was rejected and consequently he instituted a suit under the provisions of Order 21, rule 63 to establish his title. When the suit came on for hearing the 1st respondent realized that he could not succeed without a prayer for possession and he applied for leave to amend his plaint in this respect. The leave to amend was refused, but the District Munsiff intimated that he would be prepared to allow the 1st respondent to withdraw his suit with liberty to file a fresh suit under Order 23, rule 1 of the Code of Civil Procedure. The 1st respondent, realising that he would be in a difficulty with regard to limitation, raised this question before the District Munsiff, but the District Munsiff considered that section 14 of the Limitation Act would apply. Accordingly he decided to embody his opinion in his order. He did so in these words:

> "Plaintiff seems to entertain some apprehension on point of limitation, because this suit is for setting aside a claim and it had to be filed within one year of the order. But I am inclined to give him the benefit of section 14 of Limitation Act and hold that point of limitation shall not prejudice his filing of a fresh suit.
>
> I therefore grant this petition giving permission to withdraw the suit with permission to file a fresh suit for the same reliefs prayed for here and for possession and on the same cause of action without any prejudice whatever to plaintiff on the question of limitation. Time for filing the fresh suit is one month."

The District Munsiff further directed that the 1st respondent should pay half the costs of the appellant.

In due course the first respondent filed a fresh suit. The appellant raised the plea of limitation, but in view of the order which has just been quoted, the District Munsiff held that the suit was within time, notwithstanding that it had been filed more than twelve months after the date of the dismissal of the claim petition. The District Munsiff also held that the appellant could not raise the question of limitation because he had accepted the order for costs passed in the previous suit. On appeal the District Judge of Bellary agreed with the District Munsiff and this appeal is from the decision of the District Judge.

It is manifest that the District Munsiff was wrong in holding that section 14 of the Limitation Act applied in such a case. A Bench of this Court in *Arunachellam Chettiar* v. *Lakshmana Aiyar*,[1] held that section 14 does not apply and it was pointed out

1. (1915) 29 M.L.J. 569: I.L.R. 39 Mad. 936.

Virupakshappa v. Veerabhadra Gowd.

Leach, C.J.

there that the Bombay and Calcutta High Courts had expressed the same opinion. A Full Bench of the Allahabad High Court has expressed an opinion to the same effect. See *Sadayatan Pande* v. *Ram Chandra Gopal.*[1] *Arunachellam Chettiar* v. *Lakshmana Aiyar*[2] is binding on this Court, as it was binding on the Court below. It is conclusive on the question whether the District Munsiff was right in holding that section 14 applied.

The learned advocate for the 1st respondent does not dispute this, but he says that inasmuch as the District Munsiff gave the 1st respondent leave to withdraw the first suit with permission to bring a fresh suit and at the same time stated that this would be without prejudice to the 1st respondent on the question of limitation, that order cannot now be challenged. While it was an erroneous order to pass, the District Munsiff had, it is said, jurisdiction to pass it and as it was not challenged in appeal it is final. This argument ignores the provisions of rule 2 of Order 23. That rule reads as follows:

> "In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted".

There is here a statutory provision which says that when a fresh suit is instituted the plaintiff shall be bound by the law of limitation. Any statement made by the District Munsiff when he gave permission to the 1st respondent to withdraw the suit under rule 1 of Order 23 could not operate to repeal rule 2. The District Munsiff had no power to impose a condition, and the fact that he did does not relieve the 1st respondent from the responsibility of filing his suit in time. Moreover, a defendant in such a suit cannot be prejudiced by what the Court may happen to say in passing an order under rule 1. The argument that the appellant is estopped from raising the question of limitation because he accepted costs which were awarded to him in the first suit has only to be stated to be rejected. There is no substance in it at all.

For these reasons the appeal will be allowed and the suit dismissed with costs throughout. The memorandum of cross-objections which has been filed will be dismissed with no order as to costs.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE BYERS.

K. S. Muthuswami Chettiar .. *Appellant** (1*st Respt.*)

v.

Ramaswami Samiyar and others .. *Respondents* (*Applt. and Respts.* 2 *and* 3 *and nil*).

Muthuswami Chettiar v. Ramaswami Samiyar.

Transfer of Property Act (IV of 1882), *section* 92, *para.* 3—*Purchase of property—Payment of portion of purchase-money in discharge of encumbrance—Whether purchaser entitled to subrogation of mortgagee's rights—If not, whether to the equitable relief of a charge.*

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1. (1934) I.L.R. 57 All. 145 (F.B.).
2. (1915) 29 M.L.J. 569: I.L.R. 39 Mad. 936.

*L.P.A. No. 6 of 1941. 5th March, 1942.

Muthuswami Chettiar *v.* Ramaswami Samiyar

Since the amendment of the Transfer of Property Act in 1929 a transferee who had discharged an encumbrance on a property cannot be held to be subrogated to the rights of the mortgagee unless an agreement in writing to that effect has been entered into between him and the transferee and the document has been registered.

Palamalai Mudaliar v. *The South Indian Export Company, Ltd.*, (1909) 20 M.L.J. 211: I.L.R. 33 Mad. 334, referred to.

Nor could the Court defeat the object of the amendment by giving equitable relief in the form of a charge to the transferee.

Appeal under clause 15 of the Letters Patent against the decree of the Hon'ble Mr. Justice Wadsworth, dated 11th February, 1941 and passed in S.A. No. 59 of 1940 preferred to the High Court against the decree of the District Court of Madura in A.S. No. 78 of 1938 (O.S. No. 56 of 1937, Sub-Court, Dindigul).

K. Rajah Aiyar and *K. S. Ramamurthi* for Appellant.

T. P. Gopalakrishna Aiyar, L. K. Sarma and *K. Srinivasan* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question for decision in this appeal is whether a transferee of immovable property is entitled to a charge on it in respect of the amount disbursed by him in paying off a mortgage on the property when he is not entitled to be subrogated to the rights of the mortgagee by reason of the fact that there does not exist a registered agreement of the nature of that contemplated in the third paragraph of section 92 of the Transfer of Property Act.

The first paragraph of the section states that any of the persons referred to in section 91 (other than a mortgagor) and a co-mortgagor shall, on redeeming the property subject to the mortgage, have, as regards redemption, foreclosure or sale, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or another mortgagee. The second paragraph says that the right conferred by the section is called the right of subrogation and a person acquiring such right is said to be subrogated to the rights of the mortgagee whose mortgage he redeems. In the third paragraph it is provided that a person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee, if the mortgagor has, by a registered instrument agreed that he shall be so subrogated. In the present case there is no registered agreement, but it is contended by the appellant that this does not prevent the Court from granting him in the exercise of its equitable jurisdiction, a charge over the properties in suit. The argument is that section 92 only applies in a case of subrogation, which means that the person redeeming the mortgage stands in the shoes of the mortgagee in every respect. A person who is merely entitled to a charge is not in the same position as a mortgagee. In the case of a mortgage there is a transfer of an interest in the property and the contract entered into between the mortgagor and the mortgagee is the governing factor. In the case of a charge no interest is transferred. A person entitled to a charge granted by the Court is confined strictly to

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the terms imposed by the Court and does not stand in the shoes of the mortgagee.

Before proceeding to discuss the question further, it will be well to set out the facts. On the 15th June, 1934, the appellant bought the properties in suit from the 2nd respondent and the father of the 3rd respondent, who were joint. The consideration alleged was Rs. 3,500 of which Rs. 2,000 was to be paid in the discharge of a mortgage on the properties, Rs. 71-4-0 in cash, and the balance in the discharge of unsecured debts. On the 3rd July, 1934, the appellant paid the amount due to the mortgagee, but he did not discharge the other debts and did not pay the Rs. 71-4-0. On the 23rd April, 1934, the 1st respondent filed a suit against the 2nd and 3rd respondents to recover the amount claimed by him to be due on a promissory note, and on the 23rd December, 1935, obtained a decree for Rs. 3,300 inclusive of interest and costs. On the 23rd November, 1936, the 1st respondent attached the properties in suit. The appellant objected to the attachment, but his objection was overruled by an order of the Court, dated the 31st August, 1937. On the 6th October, 1937, the appellant filed the present suit under the provisions of Order 21, rule 63 of the Code of Civil Procedure. The defence raised was that the transfer of the properties to the appellant on the 15th June, 1934, constituted a fraud on the creditors and therefore was void under section 53 of the Transfer of Property Act. The Subordinate Judge of Dindigul, in whose Court the suit had been filed, held that the sale did constitute a fraud on the creditors, but declared that the appellant was entitled to a charge on the properties in respect of the Rs. 2,000 which he had paid to the mortgagee and on this footing he dismissed the suit. On appeal the District Judge of Madura agreed with the Subordinate Judge. The 1st respondent then appealed to this Court, and his appeal was heard by Wadsworth, J., who disagreed with the opinion of the Courts below that the appellant was entitled to a charge. The learned Judge held that a person could not obtain a valid charge without there being a registered agreement. In his opinion the section made no difference between a person claiming a charge and a person claiming the right of subrogation. The present appeal is from this decision.

In *Lakshmi Amma* v. *Sankaranarayana Menon*,[1] a Full Bench of this Court held that the first paragraph of section 92 of the Transfer of Property Act applies only to a case in which a person who has a pre-existing interest in the property pays off a prior charge for the protection of his own interest and that the third paragraph refers to a case in which a person acquires an interest in property only by reason of advancing money to pay off an existing mortgage debt. Admittedly the appellant had no pre-existing interest in the properties, and consequently the third paragraph of the section applies to him. In these circumstances the appellant clearly cannot claim to be subrogated to the rights of the mortgagee whose debt he discharged. Mr. Raja Aiyar, on behalf of the appellant, has, however, placed

1. (1935) 70 M.L.J. 1: I.L.R. 59 Mad. 359 (F.B.).

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great reliance on the judgment of this Court in *Palamalai Mudaliar* v. *The South Indian Export Co., Ltd.,*[1] where a transfer was set aside on the ground that it fell within the mischief of section 53 of the Transfer of Property Act, but on the condition that the defendant had a charge for Rs. 7,500 the amount which he had expended in discharging a mortgage on the property. He says that this decision recognises a difference between a right of subrogation and a right to a charge.

The judgment in *Palamalai Mudaliar* v. *The South Indian Export Company, Ltd.,*[1] does not indicate that the learned Judges had in mind the technical distinction between a person who is entitled to a mortgage and a person who is entitled to a charge, a distinction which Mr. Rajah Aiyar has so much emphasized. In *Muthuvasu Chettiar* v. *Velumuruga Nadar,*[2] Varadachariar, J., stated that it was well-established law that if a transaction offends against section 53 of the Transfer of Property Act, it cannot ordinarily be upheld, even to the extent to which it may be found to be supported by consideration, but an exception has been made in the transferee's favour in cases in which a part of the consideration has been applied in the discharge of pre-existing secured debts and it has been held that the transferee might in such cases be entitled to the benefit of the doctrine of subrogation.

Other cases have been quoted to the Court, in the course of the arguments and it would appear that the expressions "charge" and "subrogation" have been used much in the same sense. We are however, prepared to accept the proposition that a person who is entitled to be subrogated to the rights of a mortgagee is in law in a somewhat different position to a person who is merely entitled to a charge under an order of the Court. But this does not mean that the appellant is entitled to ask the Court to give him a charge. Since the amendment of the Act in 1929 the Court cannot hold a transferee who has discharged an encumbrance on the property to be subrogated to the rights of the mortgagee unless an agreement in writing has been entered into between him and the transferee and the document has been registered. That being the position, is the Court to defeat the very object of the amendment by giving equitable relief in the form of a charge? Equity follows the law and in my opinion that maxim applies in full force here. To accept the argument which has been presented to the Court would mean setting the section at naught, and this cannot be done.

This is sufficient to dispose of the appeal, but there is a further factor. Equity will not grant relief to a person who comes into Court with unclean hands. We are aware that in some cases —the case in *Palamalai Mudaliar* v. *The South Indian Export Company, Ltd.,*[1] is one in point—the Court has granted equitable relief to a person whose hands have not been altogether clean, but this does not mean that the Court is going to grant relief to a

1. (1909) 20 M.L.J. 211: I.L.R. 33 Mad. 334.
2. (1939) 2 M.L.J. 362.

Muthuswami Chettiar *v.* Ramaswami Samiyar.

Leach, C.J.

person who has been a prima mover in the committal of fraud on another's creditors. The appellant in this case is the maternal uncle of the 3rd respondent and took a prominent part in bringing this transaction about. Each case must be decided on its own particular facts, but the facts in this case are such that we should not have been prepared to grant relief to the appellant even if his first argument had proved to be acceptable.

The appeal fails and will be dismissed, but we make no order as to costs. The hearing of the appeal commenced on the 26th February, 1942. As it was not concluded it was adjourned to the 2nd March, but at the request of the learned advocate for the 1st respondent and for his personal convenience the adjournment was extended until to-day. When the Court rose on the 26th February the learned advocate for the respondent had just commenced his address. When the case was called on to-day the Court was informed that he was in another Court, but would be free to appear in this Court in ten minutes' time. It was his duty to be here when called upon to resume his argument, but, as he was not and the Court has not had his assistance to a material extent his client is not entitled to an order for costs.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

C. R. Subramania Aiyar .. *Appellant** (*Applicant*)

v.

The Official Assignee, Madras .. *Respondent* (*Respt.*).

Subramania Aiyar *v.* Official Assignee, Madras.

Madras High Court Insolvency Rules (1933), *Order* 17, *rule* 19—*Scope—Assignee's right to charge commission on payments made under a composition.*

It is the settled practice of the Madras High Court to allow the Official Assignee to charge commission on payments made under a composition and rule 19 of Order 17 of the Insolvency Rules of the Madras High Court is wide enough to permit of this.

Re *Christie*: Ex parte *Christie*, (1900) 1 Q.B.D. 5, distinguished.

[Re-casting of the rule to make the position clear advised.]

Appeal from the judgment and order of the Honourable Mr. Justice Chandrasekhara Ayyar, dated 4th February, 1942 and made in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 461 of 1941 in I.P. No. 12 of 1936.

K. V. Krishnaswami Aiyar and *R. Rajagopala Aiyangar* for Appellant.

Official Assignee in Person.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal raises the question whether the Official Assignee is entitled to charge commission when funds have been paid into his hands in pursuance of a scheme of composition. The appellant was adjudicated an insolvent by this Court on the 8th January, 1936. His liabilities amounted to Rs. 56,978, but he was entitled to have his debts scaled under

*O.S.A. No. 17 of 1942. 13th August, 1942.

Subramania Aiyar v. Official Assignee, Madras.

Leach, C.J.

the Madras Agriculturists' Relief Act of 1938, and when this had been done his total indebtedness was reduced to Rs. 47,832. Later three creditors withdrew their claims, and as the result of their action the total indebtedness was reduced further to Rs. 33,887-7-6. The Official Assignee sold certain properties belonging to the insolvent and in this way realized Rs. 9,538-15-8. At this stage the appellant made a proposal to his creditors that they should waive interest and that they should be paid the principal sums due to them in full. He had arranged with one Mr. R. S. A. Sankara Aiyar, a banker, to advance him Rs. 25,750 on the security of a mortgage of immovable property. The creditors were willing to forego their interest and the Court was asked to approve and did approve of the scheme. Accordingly on the 27th of October, 1941, Mr. Sankara Aiyar paid into Court the Rs. 25,750.

In order to pay the creditors in full a further sum of Rs. 1,783 was required. This was paid into Court by the insolvent in three instalments between the 10th of November, 1941 and the 4th of December, 1941. On the 17th of November, 1941, the Court passed an order annulling the adjudication and directed that the money should be paid to the Official Assignee but should not be distributed by him for two weeks. The order directing the distribution to be delayed was passed in order that time should be given to Mr. Sankara Aiyar to obtain the execution and registration of the mortgage. This was done within the period and thereupon Mr. Sankara Aiyar informed the Official Assignee that he was in a position to distribute the monies in his hands to the creditors in accordance with the composition arrangement. The Official Assignee did this and claimed to be entitled to charge the usual commission of five per cent. The appellant objected. According to him the rules did not permit the Official Assignee to charge commission in the circumstances of the case. His objections were heard by Chandrasekhara Ayyar, J., who held that the commission was payable. The appeal is from the learned Judge's order.

Order 17, rule 19 of the Insolvency Rules of this Court states:

> "The Official Assignee shall charge a commission at the rate of five per cent. upon the monies from time to time to be paid as dividends out of the estate of any insolvent in his hands and credit the commission so levied to the office charges fund."

Mr. K. V. Krishnaswami Aiyar on behalf of the appellant says that as the Official Assignee is permitted to charge commission on monies paid "as dividends out of the estate" it means that he can only charge a commission on assets realized by him, and in this case, apart from the sum of Rs. 9,538-15-8 on which he was paid his commission, there has been no realisation. In support of his contention he points to the decision of Wright, J., in *Re Christie*: Ex parte *Christie*.[1] That decision was concerned with the English Bankruptcy Rules, and as Chandrasekhara Ayyar, J., has pointed out the language in the English rules is very different from the language used in rule 19 of Order 17 of our rules.

1. (1900) 1 Q.B.D. 5.

Subramania Aiyar v. Official Assignee, Madras. — Leach, C.J.

It has throughout been the practice of this Court to allow the Official Assignee a commission of five per cent. on all monies paid out by him under a scheme of composition. Form 21 of Appendix I to the rules, which is the form used when there is a proposal for a composition mentions the commission payable to the Official Assignee, and the debtor in making the proposal has to state what provisions are to be made for its payment. Rule 21 of Order 17 provides for the payment of commission to the Official Assignee upon the balance remaining in his hands upon the dismissal of a petition or the annulment of an order of adjudication. It is the practice of other High Courts and in England to allow commission on amounts paid under a scheme of composition. The Insolvency Rules of the Calcutta and Bombay High Courts make express provision for this, and to prevent the present question arising in future it is advisable that the position should be made perfectly clear by a suitable amendment in our rules. Rule 218 of the Bankruptcy Rules, 1915, relates to payments under a composition scheme, and in the margin there is this note: "Dividends under composition or scheme". Therefore, according to the English practice a payment made under a composition is regarded as a dividend.

We are not prepared to read rule 19 of Order 17 of our rules differently from the way in which it has hitherto been read. We have already indicated that it has been the settled practice of this Court to allow the Official Assignee to charge commission on payments made under a composition and we hold that the rule is wide enough drawn to permit of this, but to save trouble in future we advise that it should be recast.

The appeal will be dismissed.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Sri Kallalagar Devasthanam, Madura, through its trustee K. N. Radhakrishna Aiyar . *Appellant** (1*st Respt.*)

v.

M. Baskaram Pillai and another .. *Respondents* (*Petr. and 5th Respt.*).

Kallalagar Devasthanam, Madura v Baskaram Pillai

Practice—Incompetent appeal to lower Court dismissed on merits—Second appeal—Maintainability—Interference with trial Court's order in revision—Permissibility.

When a lower appellate Court entertains an appeal which is not competent and modifies the decision of the trial Court a second appeal will lie. But it is doubtful whether such a second appeal will lie when the lower appellate Court has dismissed the appeal preferred to it. Where the lower Court wrongly entertains the appeal and dismisses the same on the merits the only order which can properly be passed in second appeal—if one lies—would be to set aside the incompetent appellate order. And there will be no need to go into the trial Court's order which is unaffected by the incompetent appellate decision. Should the High Court, when hearing a second appeal against an incompetent appellate order, come to the conclusion that the trial Court's order is wrong on the merits, in a proper case it may interfere in revision with the order of the trial Court.

*A.A.A.O. No. 190 of 1939. 10th September, 1941.

Kallalagar Devasthanam, Madura v. Baskaram Pillai.

Appeal against the order of the District Court of Madura, dated the 30th day of January, 1939, and made in A.S. No. 126 of 1938 (M.P. No. 60 of 1938 in E.P. No. 127 of 1937 in S.S. No. 37 of 1930, Deputy Collector's Court, Melur Division).

K. V. Srinivasa Aiyar for Appellant.

R. Venkataraman and *R. Viswanathan* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of an application under section 23 of Madras Act IV of 1938. The sale in question was in execution of a decree under the Madras Estates Land Act and the principal contention of the appellant in the trial Court was that section 23 does not apply to sales under the Estates Land Act. That question has been settled in *Polisetti Venkataratnam* v. *Dhulipudi Surya Rao*[1] and it must now be held that section 23 applies to sales under any decree of Court. Before going into the merits of the appellant's case, it has to be decided whether this Court can, on this appeal, go into the question of the correctness of the trial Court's order. The trial Court's order was taken up in appeal to the District Judge. The District Judge, without considering the competence of the appeal, dismissed the appeal on the merits and it is argued that this decision gives rise to a right of second appeal. It is well-established that when a lower appellate Court entertains an appeal which is not competent and modifies the decision of the trial Court, a second appeal will lie. See *Bandiram Mookerjee* v. *Purna Chandra Roy*,[2] *Jwala Prasad* v. *Salig Ram*[3] and *Ram Ratan Prasad* v. *Banarsi Lal*.[4] But it is doubtful whether such a second appeal will lie when the lower appellate Court has dismissed the appeal preferred to it. Certainly if the lower appellate Court dismissed the appeal as incompetent, there is no apparent reason for entertaining a second appeal against that decision. It is argued that if the lower appellate Court wrongly entertains the appeal and dismisses the appeal on the merits, the decision would give rise to a right of second appeal just as if the lower appellate Court had interfered with the trial Court's order. Some authority for this proposition is found in a decision of Walsh, J., in *Nachimuthu Chettiar* v. *Ramakkal*[5] which quotes the words in *Ram Ratan Prasad* v. *Banarsi Lal*[4] to the effect that a second appeal will lie whatever be the nature of the order passed by the lower appellate Court. But the Patna case was dealing with a contention that there would be no second appeal if the lower appellate Court has merely remanded the case. It was not dealing with a case in which the lower appellate Court has dismissed the appeal. Whatever be the correct view on the question—whether the dismissal of an incompetent appeal will give rise to a right of second appeal, it seems to me that the question is largely academic; for if the District Judge wrongly entertained an appeal and dismissed that appeal on the merits, the only

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1. (1941) 1 M.L.J. 156.
2. (1917) I.L.R. 45 Cal. 926.
3. (1891) I.L.R. 13 All. 575.
4. (1929) I.L.R. 9 Pat. 685.
5. A.I.R. 1933 Mad. 475.

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order which can properly be passed in second appeal would be to set aside the incompetent appellate order. There is no apparent justification for going into the merits of the trial Court's order, which is unaffected by the incompetent appellate decision. Should this Court, when hearing a second appeal against an incompetent appellate order come to the conclusion that the trial Court's order is wrong on the merits, in a proper case this Court will no doubt interfere in revision with the order of the trial Court. But in second appeal the only thing which this Court can properly do is to set aside the incompetent appellate order.

On the facts of the present case, it does not appear that there are any grounds upon which the revisional jurisdiction of this Court can be invoked against an order of the trial Court. In this view I dismiss the appeal with costs.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Maddali Sreeramulu and another .. *Appellants** (*Plffs.*)

v.

Kavur Thandavakrishnayya and others .. *Respondents* (*Defts.*).

Sreeramulu v. Thandavakrishnayya.

Mortgage—Suit on—Father executing deed for himself and for minor sons as guardian—Failure of consideration alleged—Onus of proof—Plaintiff's liability to prove validity of mortgage and legal necessity for debt as regards sons' interest.

In a suit on a mortgage deed executed by a person for himself and as guardian of his minor sons, the defence was that the mortgage was without consideration and executed with a view to preserving the property against his own bad ways. On the question of the onus of proof,

Held, that once consideration was found to have been admitted by a person, the onus of proving its failure would have to be, generally speaking, discharged by him or by those who claim through him.

If the mortgagee wanted to enforce his mortgage as mortgage and to get a decree for sale against the sons' interests, he would have to establish that the mortgage had been executed by their father either for legal necessity or for payment of an antecedent debt. The recitals by the mortgagor alone would be insufficient against the sons to shift the onus of proof.

Appeal against the decree of the Court of the Subordinate Judge of Guntur, dated 28th October, 1937, and made in A.S. No. 21 of 1937 preferred against the decree of the Court of the District Munsiff of Narasaraopet in O.S. No. 22 of 1934.

Ch. Raghava Rao for Appellants.

P. Satyanarayana Rao for Respondents.

The Court made the following

ORDER.—This appeal arises out of a suit brought on the basis of a mortgage-deed (Ex. A) executed by the 1st defendant for himself and as guardian of his minor sons, defendants 2 and 3 on the 25th November, 1929, for a sum of Rs. 700. The defence raised on behalf of the father was to the effect that the mortgage was without consideration and executed with a view to preserve the property against his own bad ways. A separate written state-

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*S.A. No. 375 of 1938 and C.M.P. No. 1015 of 1942. 6th April, 1942.

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ment was put in on behalf of the minor sons in which the validity of the mortgage was also contested. Two issues were framed by the District Munsiff of Narasaraopet:

(1) Whether the suit mortgage is true and valid, supported by consideration and binding on the defendants 2 and 3?

(2) Whether the suit mortgage was executed in the circumstances stated by the 1st defendant and as such is unenforceable? On a consideration of the evidence adduced by the parties, the trial Court decided both these issues in favour of the plaintiff and decreed the suit. But on an appeal having been taken to the Subordinate Judge of Guntur, this decree was reversed on the ground that the mortgage-deed Ex. A was not supported by consideration. In doing so he held the onus to be on the plaintiff as he was under the impression that the case made out by the plaintiff in regard to the passing of consideration at the trial was different from what was stated in the document although he happened to observe that the question of onus did not arise at that stage. In spite of this, however, if I read paragraph 2 of his judgment aright, I feel that his conclusion as to consideration was mostly if not wholly based on his view as to the onus of proof. Having held the mortgage-deed Ex. A to be without any consideration, the lower appellate Court abstained from going into the second issue raised at the trial and dismissed the suit. This has led the plaintiff to prefer the present appeal.

The recital of consideration in Ex. A was to the following effect:

"We have received in all Rs. 533-1-3 by your undertaking to pay to the aforesaid creditors. This sum of Rs. 533-1-3 and the sum of Rs. 166-14-9 borrowed from you in cash this day for our family expenses make a total of Rs. 700."

My attention was drawn by learned counsel for the appellant to the words "by *Havalat*" appearing after the word "creditors" thereby implying that the recital was to the effect that there was a novation or in other words the plaintiff had agreed to make himself liable to the creditors who had accepted him, *i.e.*, the plaintiff as their debtor, thereby discharging the defendant or defendants from his or their liability to the creditors mentioned in Ex. A. This may be correct; but it is clear that the case was not put on behalf of the plaintiff in that manner and was not therefore considered from that aspect by both the lower Courts. Moreover, different interpretations were placed upon this clause by learned counsel for the parties and by the Court interpreter. But in view of the decision at which I have arrived it seems to me unnecessary to decide the correct meaning of these words at this stage although it must be stated that the difference alleged to have been existing between the allegations of the plaint and those contained in the mortgage-deed Ex. A referred by the lower appellate Court in paragraph 3 of its judgment is incorrect. There was a reference to an undertaking by the plaintiff to pay to the creditors in both these documents.

From the way the case was dealt with by the trial Court or treated by the lower appellate Court, it appears that the matters

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in controversy were not looked at in their correct perspective and the question in regard to the onus was not fully appreciated by both the subordinate Courts. It must be, however, admitted that the pleas taken on behalf of the 1st defendant were not very clear. He came to Court with a mere denial of consideration but in view of what was contained in the document in regard to the debts that were due by him, he apparently intended to raise the plea of failure of consideration. If he intended to do so, the onus of proving that the sum of Rs. 166-14-9 had not been received by him or that the consideration of the deed in regard to the debts due by him had otherwise failed should have been in view of his own admission in the document laid on him. The plaintiff's "undertaking to pay to the aforesaid creditors" was in itself good consideration so far as the 1st defendant was concerned, and must be regarded to be sufficient in law on the date on which the mortgage was executed. That the 1st defendant's admission in regard to the receipt of the consideration in the deed would shift the onus of proving the absence of it, on him or on those who claim through him admits of no doubt. It is fully borne out by the decision of their Lordships of the Privy Council in *Thakur Bhagwan Singh* v. *Bishambhar Nath*[1] to which my attention was drawn by learned counsel for the appellant. The facts of that were that one Durjan Sal, the father of the 1st appellant in that case and the great grandfather of the 2nd and 3rd appellants had mortgaged some of his ancestral land to one Bhojraj, the father of the 4th respondent for Rs. 25,000. The consideration for the mortgage was stated in the deed to be a discharge of two promissory notes with interest amounting to Rs. 6,221-8-0 and a cash payment of Rs. 18,778-8-0 for payment of a debt due under the bond. The execution of the mortgage and the receipt of Rs. 6,221-8-0 were admitted by the mortgagor in the presence of the Sub-Registrar who certified that the cash payment of Rs. 18,778-8-0 was made to the mortgagor in his presence. In regard to the onus of proof their Lordships observed, in the circumstances, as follows:

> "But in the opinion of their Lordships, the onus of proof on the question whether there was consideration or whether the full consideration stated in the mortgage did in fact pass is wholly on the defendants and it is not for the plaintiff to prove this matter affirmatively."

The position would be the same if the 1st defendant pleaded subsequent failure of consideration. Once consideration is found to have been admitted by a person, the onus of proving its failure would have to be, generally speaking, discharged by him or by those who claim through him.

But inasmuch as the defendants in the Privy Council decision happened to be the son and grandson of the mortgagor, learned counsel for the appellant contended that the onus of proving the want of consideration should lie, in view of the admission by the 1st defendant in the mortgage-deed, not only on him, but on his minor sons as well. It must be, however, remembered that Durjan Sal had apparently died before the suit and his son and grand-

1. (1940) 2 M.L.J. 452: I.L.R. (1940) Kar. (P.C.) 267.

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son were being sued on the mortgage executed by their father and grandfather as his heirs or legal representatives and the question as to the extent of consideration alone, as distinct from the question of its being binding on the son or the grandson, was being taken by their Lordships into consideration.

Learned counsel for the respondents has drawn my attention to a decision of this Court in *Mariappa Goundan* v. *Palaniappa Goundan*[1] which refers to an earlier decision of a Division Bench of this Court in *Raghavendra Rao* v. *Venkatasami Naickan*[2] and holds that the admission contained in a recital of a document only applies to the case where the suit is brought either against its executant himself or against persons who are claiming under him and has no application to the persons on whom the family properties devolve by the rule of survivorship. This seems to be correct as apart from the question of a pious obligation which alone is not sufficient to validate a mortgage as such, the fact whether the father's statement in the recitals of a document binds the other members of the coparcenary would depend on the fact whether he was entitled to make an alienation on their behalf. It is unnecessary however to rest my decision on this ground as the plaintiff, if he wishes to enforce the mortgage *qua* mortgage and to get a decree for sale against the sons' interests, will have to establish that the mortgage had been effected by the 1st defendant either for a legal necessity or for the payment of an antecedent debt. If the plaintiff succeeds in establishing his allegation, the mortgage of the minors' interest in the joint family property would have to be held valid. In order to substantiate his allegations against the sons, the plaintiff would have to prove either necessity in fact or its legitimate substitute, a *bona fide* and proper enquiry as to the existence of such necessity or the existence of antecedent debts. Since he cannot succeed in getting his decree for sale against the sons without proving these facts, he must prove against the minors, in spite of the recital contained in Ex. A, the money which he advanced to the 1st defendant for legal necessity or on his behalf to his creditors in payment of antecedent debts and the recitals by the 1st defendant alone are not sufficient against them to shift the onus of proof.

The first issue therefore would have to be sub-divided into two portions laying the onus on the 1st defendant so far as his denial or plea as to failure of consideration is concerned and on the plaintiff both in regard to the payment of consideration by him as well as to the existence of legal necessity or of antecedent debts which could have entitled the father (the 1st defendant) to alienate his sons' interest in the joint family property.

For the above reasons, I would call for a fresh finding on both these issues, and permit the parties to adduce such further evidence as they may, in the light of my observations, desire to do. The case may be sent to the Court of first instance for recording further evidence and submitting its findings to this Court by the 9th August, 1941. Time for objections ten days.

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1. A.I.R. 1930 Mad. 796.
2. A.I.R. 1930 Mad. 251.

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[In pursuance of the above order, the District Munsiff of Narasaraopet submitted the finding.]

* * * * * *

After receipt of the finding, the Court delivered the following

JUDGMENT.—The finding has been received. The learned District Munsiff has in a well-considered judgment come to the decision that the 1st defendant was liable under the mortgage-deed but his minor sons have not been proved to be so. The directions in my order in regard to the circumstances under which the minors could be held liable were explicit, but no advantage was sought on behalf of the plaintiffs to prove facts which could make the minors liable under the mortgage. After hearing learned counsel for the parties, I am of the opinion that the finding of the lower Court must be confirmed.

An application was presented on behalf of the 1st defendant under the Madras Agriculturists' Relief Act (IV of 1938) to the lower Court. The learned District Munsiff however refused to entertain it on the ground that the case was sent back for a finding by this Court. This was perfectly correct. The application should have been made to this Court and not to the District Munsiff. The application presented to that Court is in this Court and the requisite court-fee thereon has been undertaken by learned counsel on behalf of the 1st defendant to be made up in the course of the day. As soon as the necessary court-fee is paid, the application will go back to the District Munsiff for enquiry as to whether the 1st defendant is an agriculturist and whether the debt or any portion of the same can be scaled down under the provisions of that Act. This will be done after opportunity to file a counter-affidavit is given to the other side.

The report as regards this application will be submitted within a month. Four days for objections.

The final decree will be passed after the receipt of the report.

[In pursuance of the directions contained in the above judgment, the District Munsiff of Narasaraopet submitted the finding.]

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After receipt of the finding, the Court delivered the following

JUDGMENT.—It has now been found that the 1st defendant is an agriculturist. A decree will, therefore, be passed against him for a sum of Rs. 700 and interest at 6 1|4 per cent. from 1st October, 1937, to the date of the decree and at 6 per cent. thereafter. As to costs, the plaintiff will have to pay the costs of defendants 2 and 3 throughout and will similarly get the costs from the 1st defendant to the extent of the amount decreed against him. There will be a decree for sale of the mortgaged property against the share of the 1st defendant. Three months for redemption.

Appeal allowed against 1st defendant.

K.C.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

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Ramasastrulu *v.* Balakrishna Rao.

Nori Ramasastrulu .. *Appellant** (*1st Deft.*)

v.

Teluguntla Balakrishna Rao and another .. *Respondents* (*Plff. and 2nd Deft.*).

Provincial Insolvency Act (V of 1920), section 28 (2)—Vesting—Insolvency of manager of joint Hindu family—Manager's power of sale over joint family properties—Does not vest in Official Receiver.

Under the Provincial Insolvency Act, on the adjudication of the manager of a joint Hindu family, his power to sell family assets to discharge debts which are payable out of the joint estate does not vest in the Official Receiver as the power cannot be regarded as property.

A right to sell vests only under the Presidency Towns Insolvency Act by virtue of section 52 which has no counterpart in the Provincial Insolvency Act. In the case of a manager who is not the father of the other coparceners the power to sell family assets to meet a family liability is not a power which he can exercise for his exclusive benefit and section 52 (2) (*b*) may not apply in such a case.

Desirability of intervention of the Central Legislature to bring the two Acts into line pointed out.

Sat Narain v. *Behari Lal*, (1924) 47 M.L.J. 857: L.R. 52 I.A. 22: I.L.R. 6 Lah. 1 (P.C.) and *Sat Narain* v. *Sri Kishen Das*, (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.), relied on; *Seetharama Chettiar* v. *Official Receiver, Tanjore*, (1926) 51 M.L.J. 269: I.L.R. 49 Mad. 849 (F.B.); *Official Receiver, Anantapur* v. *Ramachandrappa*, (1928) 55 M.L.J. 721: I.L.R. 52 Mad. 246 and *Bishwanath Sao* v. *Official Receiver*, (1936) I.L.R. 16 Pat. 60 (F.B.), not followed; *Subramaniam Chettiar* v. *Annamalai Chettiar*, (1940) 1 M.L.J. 553, explained.

Appeal under clause 15 of the Letters Patent against the decree and judgment of the Honourable Mr. Justice Venkataramana Rao, dated 25th October, 1940, and passed in S. A. No. 165 of 1938 preferred against the decree of the Court of the Subordinate Judge of Bezwada in A.S. No. 73 of 1935 (O.S. No. 504 of 1933, District Munsiff's Court, Bezwada).

K. Rajah Aiyar and *A. Venkatachalam* for Appellant.

V. Govindarajachari and *P. Satyanarayana Rao* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This Letters Patent Appeal raises the important question whether the right of a manager of a joint Hindu family to sell family assets to discharge debts which are payable out of the joint estate devolves on the Official Receiver when the manager has been adjudicated an insolvent under the Provincial Insolvency Act.

Two brothers, Ayodhyaramayya and Raghava Rao, were joint in estate. Raghava Rao died in 1923, leaving a son who is the 2nd defendant. After Raghava Rao's death Ayodhyaramayya and his nephew continued to be undivided. On the 24th November, 1927, Ayodhyaramayya was adjudicated an insolvent under the Provincial Insolvency Act. On the 12th March, 1931,

*L.P.A. No. 47 of 1940. 28th July, 1942.

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in order to discharge debts binding on the family the Official Receiver sold to one Saravayya certain family properties, which included the properties in suit. The properties were subject to mortgages and the sale to Saravayya, was, of course, subject to the rights of the mortgagees. The plaintiff purchased the properties in suit from Saravayya. Ayodhyaramayya and the 2nd defendant owed monies to the 1st defendant, who obtained a decree against them. On the 28th January, 1933, the 1st defendant attached the properties in suit, whereupon the plaintiff objected, but his objection was overruled. As the result the Court sold the properties by auction and they were purchased by the 1st defendant. The plaintiff then filed the present suit in the Court of the District Munsiff of Bezwada for a declaration that the properties were not liable to attachment by the 1st defendant. The District Munsiff held that the manager's right to sell properties to meet family debts devolved upon the Official Receiver and consequently a valid title had passed to Saravayya. Accordingly the District Munsiff granted the declaration asked for and on appeal the decision was upheld by the Subordinate Judge of Bezwada. The 1st defendant then appealed to this Court. The appeal was heard by Venkataramana Rao, J., who, feeling himself bound by decisions of this Court to which reference will be made later, dismissed the appeal, but in the course of his judgment he indicated that the question whether the manager's right to sell joint family property devolved upon the Official Receiver under the Provincial Insolvency Act required further consideration in view of the decisions of the Privy Council in *Sat Narain* v. *Behari Lal*[1] and *Sat Narain* v. *Sri Kishen Das*.[2]

Before proceeding to examine the effect of the judgments of the Judicial Committee in *Sat Narain* v. *Behari Lal*[1] and *Sat Narain* v. *Sri Kishen Das*,[2] it is necessary to refer to certain provisions of the Presidency Towns Insolvency Act and the Provincial Insolvency Act.

Section 2 (*e*) of the Presidency Towns Insolvency Act states:

> "'Property' includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit."

The definition of property in the Provincial Insolvency Act is contained in section 2 (*d*) and is word for word the same.

Section 17 of the Presidency Towns Insolvency Act states that the property of the insolvent shall vest in the Official Assignee. Eliminating a proviso which does not apply here the section reads as follows:

> "On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the Official Assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose."

1. (1924) 47 M.L.J. 857: L.R. 52 I.A. 22: I.L.R. 6 Lah. 1 (P.C.).
2. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).

The corresponding provision in the Provincial Insolvency Act is contained in section 28 (2) which says:

"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose."

There is a slight difference in the wording at the commencement, but this does not alter the meaning.

Sub-section (1) of section 52 of the Presidency Towns Insolvency Act states that the property of the insolvent divisible among his creditors shall not comprise property held by the insolvent on trust for any other person, and tools of his trade, necessary wearing apparel, bedding, cooking vessels and furniture of himself, his wife and children to the value of Rs. 300. Sub-section (2) states that subject to the provisions of sub-section (1), the property of the insolvent shall comprise the following particulars:

"(a) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge;

(b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge; and

(c) all goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof."

Two provisos follow, but it is unnecessary to set them out.

There is no section in the Provincial Insolvency Act which corresponds to section 52 of the Presidency Towns Insolvency Act. Under the Provincial Insolvency Act the vesting of the property of the insolvent in the Official Receiver is governed only by section 2 (d) and section 28 and therefore there can be no vesting of the right of a manager of a joint Hindu family to sell family property for family necessity, unless that right can be regarded as property. The powers of a father-manager are greater that the powers of a manager who is not the father of the other coparceners, because the father has power not only to sell family property in order to discharge a family liability, but also the right to sell his sons' interest in the family estate to discharge his own personal debts, provided that they have not been incurred for any immoral or illegal purposes. In the light of the decisions of the Privy Council to which reference has been made and will be considered in a moment a father's power to sell his sons' property must be taken to be a power falling within section 52 (2) (b) of the Presidency Towns Insolvency Act, but the power of a manager who is not the father of the other coparceners to sell family assets to meet a family liability is not a power which he can exercise for his exclusive benefit, and section

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52 (2) (*b*) may not apply in such a case. That question does not, however, arise in this appeal and therefore nothing further need be said in this connection.

In *Sat Narain* v. *Behari Lal*,[1] the Privy Council held that when a Hindu father is adjudicated an insolvent under the Presidency Towns Insolvency Act, the property which he and his sons possess jointly does not vest in the Official Assignee, although under section 52 (2) of the Act or in some other way the property may be made available for the payment of his lawful debts. Their Lordships considered that the question had to be decided on the wording of the Presidency Towns Insolvency Act alone and observed that cases which have arisen under section 266 of the Code of Civil Procedure, 1882, or under section 60 of the Code of Civil Procedure, 1908, depended on different considerations. Therefore decisions in cases under those sections were likely to mislead a Court which had to construe the Presidency Towns Insolvency Act. This meant the ruling out of consideration of certain earlier decisions of this Court. Having stated that they were satisfied that it was not the intention of the Act that on the insolvency of a father the joint property of his family should vest in the Official Assignee their Lordships proceeded to sum up the position as follows:

> "It may be that under the provisions of section 52 or in some other way that property may in a proper case be made available for payment of the father's just debts, but it is quite a different thing to say that by virtue of his insolvency alone it vests in the assignee and no such provision should be read into the Act."

In other words, the manager's power to sell family property for family debts was definitely not property within the meaning of section 2 or section 17. This decision was re-affirmed by the Privy Council in *Sat Narain* v. *Sri Kishen Das*.[2] In the course of the judgment in that case their Lordships made it quite clear that the vesting section was section 52 and this section alone. Therefore it is now settled that apart from section 52 there is no provision in the Presidency Towns Insolvency Act which enables the Official Assignee to sell joint family property to meet joint family debts when the manager has been adjudicated.

In *Sat Narain* v. *Behari Lal*[1] and *Sat Narain* v. *Sri Kishen Das*,[2] the Privy Council were only concerned with the Presidency Towns Insolvency Act, and no reference was made to the Provincial Insolvency Act. The effect of the judgment in *Sat Narain* v. *Behari Lal*,[1] on a case arising under the Provincial Insolvency Act where the father had been adjudicated was considered in *Seetharama Chettiar* v. *Official Receiver, Tanjore*[3] which was decided by a Full Bench of this Court consisting of Krishnan, Ramesam and Venkatasubba Rao, JJ. The judgment of the Judicial Committee in the later Lahore case, *Sat Narain* v. *Sri*

1. (1924) 47 M.L.J. 857: L.R. 52 I.A. 22: I.L.R. 6 Lah. 1 (P.C.).
2. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).
3. (1926) 51 M.L.J. 269: I.L.R. 49 Mad. 849 (F.B.).

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Kishen Das,[1] had not then been delivered. Krishnan and Ramesam, JJ., held that the father's power to sell his sons' shares for his proper debts vested in the Official Receiver when the father was adjudicated under the Provincial Insolvency Act by virtue of the provisions of section 28. They regarded the power as property within the meaning of that section, but not as property under section 2 (*d*) of the Act. On the other hand, Venkatasubba Rao, J., held that it was property, even within the meaning of section 2 (*d*). He was of the opinion that the provisions of the Presidency Towns Insolvency Act should be disregarded when construing the provisions of the Provincial Insolvency Act and therefore the Court was not concerned with anything said by the Judicial Committee in *Sat Narain* v. *Behari Lal*.[2]

We find ourselves unable to share the opinion either of Krishnan and Ramesam, JJ., or of Venkatasubba Rao, J. We consider that the judgment in *Sat Narain* v. *Sri Kishen Das*[1] makes these opinions untenable. The Judicial Committee in both the Lahore cases were interpreting the Act governing the law of insolvency in the Presidency Towns of India and when, as we have here, decisions of the higest tribunal construing section 2 (*e*) and section 17 of the Presidency Towns Insolvency Act, the same interpretation must be placed on identical provisions in the Provincial Insolvency Act unless the Act itself contains some additional provision running counter, which is not the case. The decisions of the Privy Council in the Lahore cases undoubtedly negatived what had been regarded as being settled law but if the power of the father is not property under the Presidency Towns Insolvency Act it cannot be regarded as property under the Provincial Insolvency Act, and if the father's power is not property the power of the manager who is not the father cannot be property.

The position of a manager who is not the father was considered by this Court in *Official Receiver, Anantapur* v. *Ramachandrappa*.[3] This case came before Odgers and Curgenven, JJ. Odgers, J., was of the opinion that in spite of *Sat Narain* v. *Behari Lal*,[2] the power to sell family property for family debts vested in the Official Receiver. Curgenven, J., was of the opinion that the decision in *Sat Narain* v. *Behari Lal*[2] applied and consequently held that the power did not vest. As the result of the disagreement the case was placed before a third Judge, Devadoss, J., who agreed with Odgers, J., but indicated that the question called for consideration by a fuller Bench. The judgments in this case were also delivered before the decision in *Sat Narain* v. *Sri Kishen Das*,[1] which we consider puts beyond doubt the question now under discussion.

It is very regrettable that the law of insolvency should be different in cases which fall within the Presidency Towns Insol-

1. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).
2. (1924) 47 M.L.J. 857: L.R. 52 I.A. 22: I.L.R. 6 Lah. 1 (P.C.).
3. (1928) 55 M.L.J. 721: I.L.R. 52 Mad. 246.

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vency Act and cases which fall within the Provincial Insolvency Act. If we are to have regard to the judgments of the Privy Council in the Lahore cases, as we must, we must hold that under the Provincial Insolvency Act the manager's power to sell does not vest in the Official Receiver. Under that Act it can only vest if the power is regarded as property, and in the light of what is said in *Sat Narain* v. *Behari Lal*[1] and *Sat Narain* v. *Sri Kishen Das*[2] with regard to the effect of section 2 (*e*) and section 17 of the Presidency Towns Insolvency Act the power cannot be regarded as property. The Judicial Committee have made it abundantly clear that it is not property and that the right to sell only vests under the Presidency Towns Insolvency Act by virtue of section 52, which as we have already indicated, has no counterpart in the Provincial Insolvency Act. The remedy is in the hands of the Central Legislature and we trust that it will bring the two Acts into line and will do so without delay.

The only High Court which has considered the question since the delivery of the judgment in *Sat Narain* v. *Sri Kishen Das*[2] is the Patna High Court. In *Bishwanath Sao* v. *Official Receiver*[3] a Full Bench of that Court held that the father's power to sell vested in the Official Receiver under the Provincial Insolvency Act. We have considered that judgment, but we do not find anything in it which tends to shake the opinion which we have just expressed.

In the course of the arguments our attention was drawn to the case of *Subramaniam Chettiar* v. *Annamalai Chettiar*,[4] which was decided by my learned brother Krishnaswami Ayyangar and myself. That case was argued on the basis that it was well-settled law that where a father who is joint with his son becomes insolvent the right of realising the son's share in the family estate under the pious obligation rule devolves upon the Official Assignee or the Official Receiver as the case may be, and the statement to this effect in the judgment merely embodied what counsel there were agreed upon. The question in issue was very different from the question now before us and the Court was not called upon to consider the bearing of the Lahore cases on the Provincial Insolvency Act. We mention this in case it should ever be suggested that the judgment in the present case is in conflict with *Subramaniam Chettiar* v. *Annamalai Chettiar*.[4]

The result is that it must be declared that the Official Receiver had no power to sell the 2nd defendant's undivided share of the property, and that the plaintiff merely acquired the interest of the insolvent manager in the properties in suit, his interest being, of course, subject to the mortgages created thereon. The parties will pay and receive proportionate costs throughout.

K.S. ——— *Appeal allowed.*

1. (1924) 47 M.L.J. 857: L.R. 52 I.A. 22: I.L.R. 6 Lah. 1 (P.C.).
2. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).
3. (1936) I.L.R. 16 Pat. 60 (F.B.).
4. (1940) 1 M.L.J. 553.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE LAKSHMANA RAO.

Jaldu Balasubramaniam Chetty .. .. *Appellant**

v.

D. Kothandaramaswami Nayanim Varu and others . *Respondents.*

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Balasubramaniam Chetty *v.* Kothandaramaswami Nayanim Varu.

Benami—*Death of* benami *decree-holder—Right of real owner to come on record and apply for execution—Title of real owner—If can be decided in the execution proceedings.*

Where a decree is held by one person as a *benamidar* for another, and the holder dies, the true owner can apply for execution, and if his title is disputed, the question can be decided in those proceedings.

Kristam Naidu v. *Durvada Patrudu,* (1927) 53 M.L.J. 568: I.L.R. 51 Mad. 219, followed.

The conflict between *Manikkam* v. *Tatayya,* (1898) 8 M.L.J. 48: I.L.R. 21 Mad. 388 and *Palaniappa Chettiar* v. *Subramania Chettiar,* (1924) 48 M.L.J. 419: I.L.R. 48 Mad. 553, left open.

Appeal against the order of the Court of the Subordinate Judge of Chittoor, dated 24th January, 1940 and made in E.P. No. 172 of 1939 in O.S. No. 35 of 1936.

C. S. Venkatachariar and *T. K. Srinivasathathachariar* for Appellant.

T. S. Narasinga Rao and *R. Venkatasubba Rao* for Respondents.

[This case coming on for hearing, the Court (*Krishnaswami Ayyangar and Kunhi Raman, JJ.*) made the following]:—

ORDER OF REFERENCE TO A FULL BENCH
(*24th July,* 1942).

Krishnaswami Ayyangar, J.—On 9th September, 1936, Nookala Manickamma obtained a money decree against the respondents for Rs. 6,175-3-0 besides costs amounting to Rs. 741-13-4. The decree allowed the judgment-debtors to pay the decretal amount at the rate of Rs. 1,000 every quarter, the decretal amount being charged on the properties belonging to them. After decree Nookala Manickamma died. In September, 1939, an application for the execution of the decree was made to the Court, but it was ultimately dismissed on 4th October, 1939. The present application was filed on 8th December, 1939, by the appellant. He claimed to be entitled to execute the decree on two grounds: (1) that he was the legal representative of the decree-holder, and (2) that he was the real owner of the debt embodied in the decree, and he accordingly claimed that he should be recognised as the legal representative of the deceased plaintiff and the real owner of the debt and permitted to execute the decree. The learned Subordinate Judge in the Court below has refused to hold an enquiry into the question whether the appellant is entitled to the property in the decree in his own right as part of his family properties. He was of opinion that the executing Court cannot go behind the decree and

*A.A.O. No. 576 of 1940. 19th August, 1942.

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start an investigation regarding the claim of title put forward by the appellant. He also held the promissory note which formed the basis of the decree itself cannot be held to have been taken *benami* in the name of the original decree-holder for the benefit of the appellant's family. In this view he considered that the appellant should produce a succession certificate before proceeding further with the execution petition and accordingly gave him a month's time for the purpose. Failing compliance, he decided that the petition should be rejected.

If the property represented by the decree belonged to the joint family consisting of the appellant and his father—which we understand is his case—it is not necessary for him to produce a succession certificate for realizing it since it has survived to him on the death of his father. Nor can we agree that the principle that the doctrine of *benami* should not be recognised with respect to a promissory note is attracted to circumstances like those present here as we are here concerned with a money decree charged upon immovable property and not with the enforcing of a promissory note. The promissory note is merely a historical incident and what the Court is now concerned with is a question of the executability of a decree.

The question therefore arises whether the executing Court is not entitled to enquire into the question whether the real owner of the decree is the appellant. The judgment of the Subordinate Judge appears to proceed on the view that the executing Court has no such power. In *Manikkam* v. *Tatayya*,[1] Shepherd and Subramania Aiyar, JJ., held that if a decree is transferred to one as *benamidar* for the actual purchaser, the latter is entitled to execute the decree and his right course is to apply under section 232 of the Code of Civil Procedure, 1882, corresponding to Order 21, rule 16 of the present Code. In the opinion of these Judges the question whether the party claiming to be the real transferee is or is not such, is a question as to whether he is a representative of the party to the suit in whose favour the decree was given and therefore falls under the last paragraph of section 244 of the old Code of Civil Procedure corresponding to section 47 of the new Code. In *Palaniappa Chettiar* v. *Subramania Chettiar*,[2] Coutts-Trotter, C.J. and Srinivasa Aiyangar, J., refused to follow the decision on the ground that it was erroneous. In that case there was a transfer of the decree in favour of the agent of one Subramaniam Chettiar. The contention of the petitioner in the execution petition was that the transfer was taken *benami* in the name of his agent. The view of the Court appears to have been that the Code of Civil Procedure intended to prevent *benamidars* coming in and making applications to the Court on the general basis of the law relating to *benami* transactions. In *Kristam Naidu* v. *Durvada Patrudu*,[3] Odgers and Curgenven, JJ., held that the ques-

1. (1898) 8 M.L.J. 48: I.L.R. 21 Mad. 388.
2. (1924) 48 M.L.J. 419: I.L.R. 48 Mad. 553.
3. (1927) 53 M.L.J. 568: I.L.R. 51 Mad. 219.

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tion who is the real owner of a decree can be gone into in execution in cases where all the original parties, namely, the original decree-holder, the original alleged *benami* transferee and the original real transferee are all dead. The Court was of opinion that the decision in *Palaniappa Chettiar* v. *Subramaniam Chettiar*[1] should be limited to a case where a decree has been transferred to a person in writing and another applies to execute the decree as real owner. In *Minakshi Iyer* v. *Noor Mohamed Rowther*,[2] a Division Bench of this Court, of which one of us was a member, dissented from the view of the learned Judges in *Palaniappa Chettiar* v. *Subramaniam Chettiar*.[1]

Faint mention was made of a preliminary objection to the maintainability of the appeal by the learned advocate who appears for the respondents. The suggestion was that there has been no final order on the execution application which has only been adjourned for the production of a succession certificate by the petitioner. But we understand the order of the learned Judge to mean that an inquiry into the claim of the appellant that he is entitled to execute the decree is barred by section 47 of the Code of Civil Procedure. We are of opinion that such a decision amounts to a disallowance of the claim put forward in the execution proceeding and is appealable. In *Rama Rao* v. *Sreeramamurthi*[3] an order disallowing a plea of limitation and adjourning the execution proceedings to a later date was held to be an order from which an appeal lay under section 47 of the Code of Civil Procedure. We understand the correct principle to be that if a claim or plea is definitely allowed or disallowed the order is appealable notwithstanding that the execution petition is not terminated by it. We are of opinion that there is no substance in the preliminary objection which is accordingly overruled.

As we are inclined to the opinion that *Palaniappa Chettiar* v. *Subramaniam Chettiar*[1] has been wrongly decided, we refer the question of the correctness of the decision to a Full Bench. We may formulate the question referred in this form:

> "Whether it is open to a person who is not *eo nomine* the decree-holder or the transferee of the decree, to apply for its execution on the ground that he is the real owner."

The papers will be placed for orders before the Honourable the Chief Justice.

(This case coming on for hearing, in pursuance of the aforesaid Order of Reference to a Full Bench)

The Court expressed the following

OPINION.—The question which has been referred reads as follows:—

> "Whether it is open to a person who is not *eo nomine* the decree-holder or the transferee of the decree, to apply for its execution on the ground that he is the real owner."

1. (1924) 48 M.L.J. 419: I.L.R. 48 Mad. 553.
2. (1939) 1 M.L.J. 379: I.L.R. 1939 Mad. 1004.
3. (1936) 71 M.L.J. 388.

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As we intend to confine our answer to a case where the facts are similar to those of the present case it is necessary for us to state them in so far as they are relevant to the question.

One Nookala Manickamma sued the respondents in the Court of the Subordinate Judge of Chittoor to enforce payment of the amount due on a promissory note which had been executed in her favour and on the 9th September, 1936, she obtained a decree for the payment of Rs. 6,175-3-0 with costs. The appellant who was joint with his father alleges that the promissory note constituted an asset of the family and that Nookala Manickamma held it as the *benamidar* of his father, who was the manager. Nookala Manickamma and the appellant's father died before the 8th December, 1939. On that date the appellant instituted proceedings in execution in the Court of the Subordinate Judge. He claimed to be entitled to execute the decree for two reasons. In the first place he said that he was the legal representative of the decree-holder and in the second place that he had become the real owner of the debt embodied in the decree. The Subordinate Judge held that the Court could not go behind the decree and commence an investigation into the question whether it constituted the property of the family then represented by the appellant. He was also of the opinion that the plea that Nookala Manickamma held it as a *benamidar* could not in law be advanced. Consequently the Subordinate Judge held that the appellant was not entitled to institute proceedings in execution until he had obtained, as the representative of Nookala Manickamma, a succession certificate in respect of the decree.

The learned Judges who have made this reference have pointed out in their order that if the property represented by the decree belonged to the joint family consisting of the appellant and his father it was not necessary for the appellant to produce a succession certificate in order to realize it, since it had devolved upon him on the death of his father, and they did not agree with the opinion that a person could not hold a promissory note as a *benamidar*. They felt constrained to make the reference because of the conflict which exists between the decision of this Court in *Manickam* v. *Tatayya*[1] and *Palaniappa Chettiar* v. *Subramaniam Chettiar*.[2]

In the former of these two cases Shepherd and Subramania Aiyar, JJ., held that if a decree is transferred to a person acting as the *benamidar* for the actual purchaser, the latter was entitled to execute it under section 232 of the Code of Civil Procedure, 1882. In that case one Lakshmisetti Subrayudu obtained a decree for the payment of money and one Patti Subrayudu applied for execution on the ground that he was the transferee of the decree. The appellant alleged that he and his brother were the real transferees and that Patti Subrayudu was merely a *benamidar* for them. On this footing he himself applied to execute the decree. The learned Judges being of the opinion that the person entitled to the beneficial interest in the decree could apply for

1. (1898) 8 M.L.J. 48: I.L.R. 21 Mad. 388.
2. (1924) 48 M.L.J. 419: I.L.R. 48 Mad. 553.

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execution directed the executing Court to inquire and submit a finding on the question whether Patti Subrayudu was the real transferee or whether the appellant and his brother occupied that position.

Order 21, rule 16 of the present Code corresponds to section 232 of the Code of 1882. Order 21, rule 16 embodies certain amendments, but so far as this case is concerned, the provisions are the same. Order 21, rule 16, provides that where a decree is transferred by an assignment in writing or by operation of law the transferee may apply for execution of the decree to the Court which passed it and the decree may be executed in the same manner and subject to the same conditions as if the application were made by the decree-holder.

In *Palaniappa Chettiar* v. *Subramaniam Chettiar*,[1] Coutts-Trotter, C.J., and Srinivasa Aiyangar, J., expressed strong dissent from the decision in *Manickam* v. *Tatayya*,[2] and refused to follow it. They had no power to overrule it and the proper course, as was laid down in *Gundavarapu Seshamma* v. *Kornepati Narasimharao*[3] was to refer the question to a Full Bench. They did not, however do so, and proceeded to hold that where a decree has been transferred in writing only the transferee can apply in execution. They considered that it mattered not that the transferee was a *benamidar* for the person who sought to execute it. It may be mentioned that this decision was followed by the Lahore High Court in *Gurdial Singh* v. *Gourbakhsh Singh*[4] and the Patna High Court in *Shaikh Mohammad Anas* v. *Bhupendra Prasad Shukul*;[5] but it was dissented from by the Calcutta High Court in *Nilkantha Ghosal* v. *Ram Charan Roy*.[6]

In *Manickam* v. *Tatayya*[2] and also in *Palaniappa Chettiar* v. *Subramaniam Chettiar*,[1] the alleged *benamidar* was alive. Here she is dead and in *Kristam Naidu* v. *Durvada Patrudu*,[7] this Court considered that this distinction avoids the controversy which arose in *Manickam* v. *Tatayya*[2] and *Palaniappa Chettiar* v. *Subramania Chettiar*.[1] *Kristam Naidu* v. *Durvada Patrudu*[7] was decided by Odgers and Curgenven, JJ., who held that where a transferee of a decree has died, the Court in which execution proceedings have been instituted may inquire whether the transferee was really a *benamidar* for another and allow the real owner or his representative to execute the decree. The basis of the decision is to be gathered from the following passage in the judgment of Curgenven, J:—

"Following *Palaniappa Chettiar* v. *Subramania Chettiar*,[1] it is no doubt true that the real owner of a decree cannot claim under Order 21, rule 16, to execute it where it has been transferred in writing to the name of a benamidar for him. But once the benamidar is dead, this decision does

1. (1924) 48 M.L.J. 419: I.L.R. 48 Mad. 553.
2. (1898) 8 M.L.J. 48: I.L.R. 21 Mad. 388.
3. (1940) 1 M.L.J. 400: I.L.R. 1940 Mad. 454 (F.B.).
4. (1926) I.L.R. 8 Lah. 35.
5. (1937) I.L.R. 17 Pat. 223.
6. (1928) 55 C.L.J. 82.
7. (1927) 53 M.L.J. 568: I.L.R. 51 Mad. 219.

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not appear to me to be any authority for the position pressed upon us, that the real owner still cannot be heard to say that the decree is his; nor, I think, have we been shown any other authority for the proposition. Once the benamidar is dead, the question necessarily arises: Who is his representative, or, to use the language of Order 21, rule 16, who is his transferee by operation of law? In the ascertainment of this, there does not appear to be any provision in the Code, or any other authority, requiring the executing Court to exclude the real owner from coming forward and proving that the decree is his property. We have been shown nothing in support of the contention that, in such circumstances, the ostensible owner is to be regarded as the real owner for the purpose of ascertaining his representatives.''

We think that this distinction may be accepted. If *A* in fact holds a decree as *benamidar* for *B*, on *A's* death his heirs cannot claim it as their property. The decree is the property of *B* and death has removed the nominal holder from the scene. Why should not *B* in these circumstances ask the Court to execute the decree at his instance on the ground that by operation of law he has obtained a complete title to it?

As we are of the opinion that the decision in *Kristam Naidu* v. *Durvada Patrudu,*[1] should be followed here we answer the question referred in this way: Where a decree is held by one person as a *benamidar* for another, and the holder dies, the true owner can apply for execution, and if his title is disputed, the question can be decided in those proceedings.

The conflict between *Manickam* v. *Tatayya*[2] and *Palaniappa Chettiar* v. *Subramaniam Chettiar*[3] remains. It will have to be settled, but this does not appear to us to be the occasion, and consequently we have avoided expressing any opinion on the matter.

The costs of this reference will be made costs in the appeal.

K.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Govindaswami Achari and others .. *Appellants** (*Plffs.*)

v.

Kandaswami Achari and others .. *Respondents* (*Defts.*).

Govindaswami Achari *v.* Kandaswami Achari.

Promissory note—Endorsee for collection—Suit on the note—Prayer for relief also against the family properties in the hands of sons of executant—Sons liable—Section 50, Negotiable Instruments Act (XXVI of 1881).

An ordinary endorsee of a promissory note obtains no other right under the endorsement apart from the property in the note and cannot ask for relief against a person other than the maker on the basis of the debt evidenced by the note.

Where, however, the endorsement itself purports to assign the note expressly for the purpose of collection of the amount due on the note, the endorsee for collection is not restricted only to the remedy on the note, and relief may be given not merely against the executant personally but against the joint family properties in the hands of his sons as well.

Vira Raghavalu Naidu v. *Chinna Rajalingam,* 1939 M.W.N. 774 and *Ponnayya* v. *Palaniappa Chetty,* (1909) 7 M.L.T. 271, referred to.

1. (1927) 53 M.L.J. 568: I.L.R. 51 Mad. 219.
2. (1898) 8 M.L.J. 48: I.L.R. 21 Mad. 388.
3. (1924) 48 M.L.J. 419: I.L.R. 48 Mad. 553.

*S.A. No. 1080 of 1941. 30th July, 1942.

Govindaswami Achari *v.* Kandaswami Achari.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in A.S. No. 240 of 1940, preferred against the decree of the Court of the District Munsiff of Trichinopoly in O.S. No. 418 of 1938.

A. V. Narayanaswami Aiyar for Appellants.

K. S. Desikan and *K. R. Raman* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit brought by the appellants for recovery of the principal and interest due on a promissory note executed by one Govinda Achari the 3rd respondent herein who is now dead, in favour of the mother of the appellants 2 to 4. These appellants obtained a succession certificate in respect of the suit debt and endorsed the promissory note to their husband the 1st appellant herein for collection of the amount due thereunder. The 1st appellant thereupon brought the suit and appellants 2-4 were subsequently joined as co-plaintiffs therein.

The trial Court passed a decree against the deceased 3rd respondent personally and against the family properties in the hands of his sons the respondents 1 and 2; but the lower appellate Court purporting to follow the decision of this Court in *Vira Raghavalu Naidu* v. *Chinna Rajalingam*,[1] reversed the decree against respondents 1 and 2 and dismissed the suit as against them, holding that the suit having been brought by the 1st appellant as endorsee of the note he was not entitled to ask for relief against any other persons on the basis of the debt evidenced by the note, the endorsee having obtained no other right under the endorsement apart from the property in the note. This proposition is no doubt correct in the case of an ordinary endorsee and the decision referred to above was with reference to a suit by such an endorsee on the endorsed note. No doubt in the course of the judgment the learned Judges observed that the plaintiff admitted in his plaint that the endorsement had been made only for collection but they take care to point out that the endorsement was of the ordinary kind and their decision proceeded on that basis. The case has therefore no application here as the endorsement itself purports to assign the note expressly for the purpose of collection of the amount due on the note. Such an endorsement, according to section 50 of the Negotiable Instruments Act has the effect merely of constituting the endorsee an agent of the payee, and if the latter could have sued other persons on the debt there is no reason why the endorsee for collection should be restricted only to the remedy on the note. The decision in *Ponnayya* v. *Palaniappa Chetty*[2] shows that an endorsee for collection is in no higher position than an agent and that the endorser can himself sue on the note without getting it re-endorsed in his favour. I hold therefore that the respondents 1 and 2 can be properly made liable in the suit as on the debt and that

1. (1939) 2 M.L.J. 531: 1939 M.W.N. 774.
2. (1909) 7 M.L.T. 271.

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the decree of the lower appellate Court exonerating them was wrongly passed.

The appeal is accordingly allowed and the decree of the trial Court is restored with costs here and in the Court below.

Leave refused.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, AND MR. JUSTICE LAKSHMANA RAO.

Valliappa Chettiar .. *Petitioner**

v.

Arandi and others .. *Respondents.*

Valliappa Chettiar v. Arandi.

Madras Hindu Religious Endowments Act (II of 1927), section 44-B (2) (d) (i)—Appellate powers of District Collector under—Exercise of—Notice to respondents essential—Order without such notice—Liability to be quashed by writ of certiorari.

Notice to respondents is a condition precedent, to the exercise of appellate powers by the District Collector under section 44-B (2) (*d*) (*i*) of the Madras Hindu Religious Endowments Act. An order passed without such notice is without jurisdiction and liable to be set aside by the issue of a *writ of certiorari.*

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of certiorari calling for the records in L. Dis. No. 7652 of 1941, on the file of the Court of the Collector of Coimbatore and to quash the order, dated 15th January, 1942, and made in the said L.Dis. No. 7652 of 1941.

K. Rajah Aiyar for Petitioner.

S. Ramachandran for *M. Krishna Bharathi* for Respondents.

The Government Pleader (*K. Kuttikrishna Menon*) for Government.

The Chief Justice pronounced the following

Leach, C.J.

ORDER.—This is an application for the issue of a writ of certiorari to quash an order of the Collector of Coimbatore. The application arises out of a petition filed under section 44-B of the Madras Hindu Religious Endowments Act, 1926, asking for an order directing the resumption of certain *Devadayam* inam lands granted to the Kariakaliamman, Athanur Amman and Mariamman temples in the village of Alambadi. The petition was filed by the trustees of these temples. The petitioner now before us and six other persons were made respondents, as they were in possession of the lands as alienees. The respondents raised the contention that the section had no retrospective effect and this was accepted by the Revenue Divisional Officer. Consequently he held that the application filed by the trustees was not maintainable. Thereupon the trustees appealed to the Collector of Coimbatore under section 44-B (2) (*d*) (*i*) which says:

"Any party aggrieved by an order of the Collector under clause (*a*) may appeal to the District Collector within such time as may be prescribed,

*C.M.P. No. 2038 of 1942. 11th August, 1942.

Valliappa Chettiar *v.* Arandi.

Leach, C.J.

and on such appeal the District Collector may, after giving notice to each of the persons and bodies mentioned in clause (*b*) and after holding such inquiry as may be prescribed, pass an order confirming, modifying or cancelling the order of the Collector."

Without issuing notice to the respondents in the proceedings before the Revenue Divisional Officer and despite the fact that they had obtained an order in their favour, the District Collector directed the Revenue Divisional Officer to reopen the case and decide it on its merits. He disagreed with the opinion of the Revenue Divisional Officer that the section had retrospective effect.

In passing this order the District Collector acted without jurisdiction. He has power to reverse an order passed by the Revenue Divisional Officer under section 44-B (2), but before he exercises this power he must serve notice on the respondents and give them an opportunity of being heard. In other words, notice to the respondents is a condition precedent to his right to exercise jurisdiction in the matter.

The learned Government Pleader, as he must, concedes that notice should have been issued, but he suggests that a *writ of certiorari* should not issue as the order was substantially right. This is not the question. A party has a right to be heard and that right was denied to the respondents in the proceedings instituted by the trustees of these temples.

The District Collector has emphasised his disregard of the law in the affidavit which he has filed in opposition to the application for a *writ of certiorari*. In paragraph 4 of his affidavit he says:

"As the appellate tribunal was of opinion that the first tribunal erred on a question of law, it was entitled in law to pass orders remanding the case for fresh disposal, without sending notices to the respondents and without holding an enquiry."

In paragraph 5 he says:

"No fundamental principles of natural justice have been violated, in the course of the proceedings in L. Dis. No. 7652 of 1941. The powers of an appellate tribunal are wide enough to pass appropriate and suitable orders, according to the circumstances of each case."

Such an attitude cannot be allowed to pass without the strongest condemnation. The District Collector is there to administer the law and not to ignore it. His action in deciding the appeal made to him under section 44-B (2) (*d*) without notice to the respondents was most high-handed and he aggravates the situation by claiming a right to act in this manner. The order of the District Collector will be set aside and he will be directed to hear the appeal after proper notice has been given to the respondents in the proceedings before the Revenue Divisional Officer.

The petitioner is entitled to his costs and so are the trustee-respondents. As the Collector has chosen to oppose the application the order for the payment of costs must be made against him as a public officer. The costs will be paid within two months.

K.S. ——— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE HAPPELL.

United Motors (Coimbatore), Limited, by its managing Agent Mr. G. D. Naidu .. *Appellant** (*Plff.*)

v.

The Palghat Municipal Council, having its office in Yakkara Amsom, Palghat Taluk .. *Respondent* (*Deft.*).

United Motors (Coimbatore,) (Ltd.) *v.* Palghat Municipal Council.

Madras District Municipalities Act (V of 1920), sections 270-B and 270-D—Scope—Motor bus stand erected by municipality—Owner of buses using the stand under protest—Liability of for prescribed fee—Farming out of right to collect fees to contractor—Contractor, if can be directed to seize the bus under section 270-D for failure to pay the fees.

Parking place for motor buses and shed with waiting rooms and other conveniences provided by a Municipality are not merely intended for the convenience of the buses but also for the convenience of passengers, and if in order to pick up passengers a bus has to go to and stand in a certain place, it clearly uses that place within the meaning of section 270-B of the District Municipalities Act for the purpose of its business. There is no question of voluntary or involuntary use of the parking space. If the owner wishes to ply his bus for hire he must conform to the rules. Accordingly he is liable for the fees prescribed by the municipality. A contractor to whom the right to collect the fees has been farmed can be directed to seize the bus under section 270-D of the District Municipalities Act for failure to pay such fees.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in O.S. No. 37 of 1937.

K. Rajah Aiyar and *K. Subramaniyam* for Appellant.

D. A. Krishna Variar for Respondent.

The Judgment of the Court was delivered by

Happell, J.

Happell, J.—The appellant, the United Motors (Coimbatore), Ltd., was the plaintiff in O.S. No. 37 of 1937, in the Court of the Subordinate Judge of Palghat. The suit was for the recovery of Rs. 10,000 as damages for wrongful attachment of a bus and was brought in these circumstances. The appellant Company owned a number of buses which plied between Palghat and Coimbatore and back again. The Company had a garage in Palghat and, it would appear, waiting rooms and other conveniences for passengers adjoining the garage. Up to the latter part of 1936, the buses started from the garage where passengers got on to them and returned to the garage where the passengers alighted. This was the position until the end of 1936. Under rule 27 (D) of the Motor Vehicles Rules the Commissioner of Police in the City of Madras and the District Superintendent of Police, elsewhere may fix starting places and termini between which motor buses shall be permitted to ply for hire within their respective jurisdictions. The rule further provides that when such places have been fixed every motor bus shall start on its forward and return journeys only from such places and that the departure of motor buses from the places shall be regulated in accordance with the directions of the police officers at such places. Correspondence between the District Superintendent of Police of Malabar and the Municipal Council, Palghat, shows that as early as 1930, the District Superintendent of Police, Malabar,

*Appeal No. 300 of 1939. 24th November, 1941.

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had formed the opinion that owing to the increase of traffic in Palghat a starting place and starting times should be fixed. The correspondence also shows that the police authorities were of opinion that the fixing of starting times and of a particular place from which the buses were required to start necessitated a common stand, and in his letter Ex. I, dated 12th April, 1930 the District Superintendent of Police suggested the vacant site to the north-east of the Palghat Railway station as a suitable place for the proposed stand. The Council agreed with the District Superintendent of Police, that the starting place and a stand were desirable. Under section 270-B, of the Madras District Muncipalities Act, a Muncipal Council may construct or provide public landing places, halting places and cart stands and may levy fees for the use of the same. In the explanation to section 270-B, it is stated that "a cart-stand shall, for the purposes of this Act, include a stand for carriages (including motor vehicles within the meaning of the Indian Motor Vehicles Act, 1914)". By the end of 1936, the Municipality had acquired the necesary land and had the stand ready. It consisted of an enclosed space in which buses could stand and turn round and a roofed shed which had room for seven or eight buses and contained a waiting room for passengers and a latrine. On the 27th of October, 1936, the District Superintendent of Police, Malabar, under the provisions of the Motor Vehicles Rules 27-D, prescribed stopping and starting places and routes for motor buses plying to and from Palghat. All buses entering and leaving Palghat were required to proceed to and start from the Municipal bus stand with certain exceptions. The Temmalapuram Bus Transport Company Lmited, for instance, was allowed to start from and arrive at the Temmalapuram Bus Transport private bus stand provided that the company paid to the Municipality such fees as might be arranged. The appellant bus company sought the same privilege as was accorded to the Temmalapuram Bus Transport Company Limited, and in a letter, dated 29th September, 1936 [Ex. XXIX (c)] the District Superintendent of Police informed the appellant that he was prepared to allow the company's buses to start from and arrive at a private stand so long as that stand was on the site of the present U.M.S. Office provided that the Municipal authorities were agreeable. The Municipal authorities however, were not agreeable and on the 22nd December, 1936, refused the request of the appellant company for exemption from the obligation to use the municipal bus stand on the ground that the starting place for the buses had been fixed by the District Superintendent of Police and could not be altered by the Council. Whether the reason given for the refusal by the Municipal Council was good or bad is not material. On the 2nd December, 1936, the council prescribed a fee of two annas per day for use of the municipal stand by each bus to take effect from the 1st January, 1937.

The position, therefore, was that the appellant had to start from the stand at the specified time and he was also obliged under the rules to take up there any passengers who wished to travel in any one of his buses. From the 6th January to the 10th

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March, 1937, the appellant's buses, apparently some seventeen in number, used the municipal stand but under protest and they did not pay the prescribed fee of two annas per diem per bus. Payment was demanded on many occasions and in the end, one of the appellant's buses was seized under the provisions of section 270-D of the District Municipalities Act and sold. Hence the suit out of which this appeal arises.

The issues substantially for decision in the suit were two—(1) whether the plaintiff used the municipal stand within the meaning of the Act, and (2) whether the distraint of the bus was in accordance with law. The learned Subordinate Judge found that the appellant had used the stand within the meaning of the Act and was liable to pay the fees fixed by the Municipality for its use. On the other issue he found that the distraint was not in accordance with law but gave no damages on the ground that, as the plaintiff was bound to pay the levy made by the defendant, he could not claim damages for the consequences of his own act in not obeying the law.

The first question is whether the buses of the appellant company used the municipal stand within the meaning of section 270-B of the District Municipalities Act so as to render the company liable to pay the fees fixed. It is unnecessary, and indeed undesirable, to attempt any general definition of what is meant by 'use of a bus stand or park' such as is in question in this case. What is to be decided is whether on the facts found in this case the stand was used by the appellant's buses so as to render the appellant liable to pay the fees. The argument advanced by Mr. Rajah Aiyar for the appellant is that in order to justify a levy of the fees there must be a use of the cart-stand as a cart-stand and that a stopping or starting place is a different thing from a cart-stand. He has also argued that this is a taxing statute which must be strictly construed in favour of the subject and that consequently the user must be a voluntary and not an involuntary user. Now the facts as set out in paragraph 3 (*c*) of the plaint are that because of the police directions the plaintiff's buses went to the open space (*viz.*, the municipal stand) only to give the timings to the police constable. The plaintiff, it is averred, "never picked up nor dropped any passengers in the open space nor even stopped the engine; the conductor would get down, run up north to the constable seated in the shed, give him the timing and run back; and this was done in a few seconds. Plaintiff's buses never entered into the bus stand nor otherwise used it". Mr. Rajah Aiyar has had to concede that scarcely one of those allegations is true. The plaint seems to set out what the appellant company would like to have been the facts on which they could have based a test case, and it may well be that in the first instance they directed their drivers to act in the manner set out in the plaint. It was however, impossible for the drivers to refuse to pick up or drop passengers since the rules required that they should do so, and it is now admitted that in fact they did pick up and drop passengers. It was also impossible for the plaintiff's buses not to enter the bus stand. The stand clearly includes the whole area enclosed and not merely the shed

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and the buses had to enter this area; and it is now conceded that they did so both in order to report the time of their starting to the police constable in charge and in order that they might pick up any passengers who were entitled to travel in the bus, if there was room in it. Mr. Rajah Aiyar's argument, therefore, has not to be tested against the facts as set out in the plaint but against the facts that the bus did enter the stand or motor bus park, turned round there, stood there and took up passengers there. He argues, therefore, in effect that the appellant did not, even on these facts, use the stand because he did not intend to use it as a stand. He went there, it is said, because he had to report to the police man in charge who stood inside the park and was there compelled to pick up passengers. In support of the argument several cases have been cited but only one is at all in point.

Mr. Rajah Aiyar, relied on certain observations of Lord Hobhouse in delivering a dissenting judgment in the well-known case of *Powell* v. *Kempton Park Race Course Company*.[1] Lord Hobhouse, said that "the phrase 'use for a purpose', necessarily implies a deliberate use, a designed choice of the thing used for the purpose in hand". Mr. Rajah Aiyar argues that the use of the municipal stand by the appellant was not a deliberate use, a designed choice by the company of the stand but an involuntary use, a use made under compulsion. What Lord Hobhouse was considering however was not quite the question which is in issue now. He was considering what kind of use will make a place a place used for the purpose of betting, and he concluded that the statute struck at places the use of which for the purpose of betting was deliberate, designed and repeated. The question was not whether a certain course of conduct constituted use of a place used for betting. In the present case it is not in dispute that the Municipal stand is a cart stand within the meaning of section 270-B of the Municipalities Act. It has not to be considered whether the use of the stand by the appellant's buses makes it a cart stand within the meaning of the Act, but whether the appellant has used a cart stand which is a cart stand within the meaning of the Act as such. The argument advanced for the appellant seems to us to amount to no more than this—that the appellant did not use the municipal stand as a cart stand because he would rather not have used it at all.

It is quite an untenable proposition that a person cannot be said to use a cart-stand or car park because he is compelled to use a certain place for that purpose and not allowed to park his cart or car where he pleases. The whole object of the powers of this kind conferred on local bodies is that they should be able to secure that certain places and no others should be used for certain purposes. The appellant, of course, does not quite say that he does not use the stand within the meaning of the section because, if he wants his buses to stand anywhere, he must go to this stand and

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1. (1899) A.C. 143 at 172.

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not elsewhere. He says that in order to do what he is enjoined to do, *viz.*, start from and return to a certain place, he has to go to and stand in a car park quite unnecessarily. This, however, is a point of view adopted to suit the argument and in our opinion, not the correct point of view at all. The transport of passengers by bus is subject to rules and the bus company can only carry passengers in conformity with the rules. A company for instance has to use certain routes, ply only between certain places and have on the road only a certain number of buses. Among these rules is the rule now in question that buses must start from and return to a certain place, at certain times, and there is a further rule that a bus must take up any passengers at these places, provided there is room, for those who wish to travel in the bus. Once that rule has been made and has to be conformed to, it is obviously convenient to the bus company that there should be a place in which buses can stand and manoeuvre. What the appellant is really objecting to is not the parking place but the rule which necessitates it. Moreover the parking place and shed with waiting rooms and other conveniences are not merely intended for the convenience of buses but also for the convenience of passengers; and if in order to pick up passengers a bus has to go to and stand in a certain place, it clearly uses that place for the purpose of its business, *viz.*, the transportation of passengers. The argument that section 270-B is a taxing section and must be strictly construed is beside the point. There is no question of voluntary or involuntary use of the parking space. If the appellant wishes to ply his bus for hire he must conform to the rules. If he does not wish to conform to the rules he need not ply his buses for hire.

The learned Subordinate Judge referred to the decision of Burn, J. in In re *M. S. Ponnuswami Aiyar*.[1] In that case it was held that where buses went in order to pick up and put down passengers there, stopping no longer than was necessary for that purpose, they did stand there for the purpose of their own business and the shed was a cart shed within the meaning of section 270-B. We can have no doubt that in the present case by standing in the municipal stand or bus park, however it be named, for the purpose of taking up and putting down passengers, the appellant used the stand wthin the meaning of section 270-B and is so liable to pay the fee fixed by the Municipality for its use.

With regard to the question whether the seizure and sale of the appellant's bus was in accordance with law, the facts were these. The municipality had sold by auction or, in other words, had farmed the right to collect the fees fixed for the use of the stand, to a certain Migael. When the appellant company refused to pay the fees for the use of the cart stand, there was correspondence between the contractor and the Muncipal Council, and in the end on the 2nd March, 1937, the Commissioner wrote to Mr. Migael, a letter Ex. XXXV (*a*) which ended "the contractor is directed to seize, detain, and immediately send to me any of

1. (1938) 1 M.L.J. 485.

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the buses belonging to the United Motors Service which use the stand." The actual seizure was made by the contractor's agent, a man named Mandody. The learned Subordinate Judge did not decide whether the power to order the seizure of the motor bus was in the Municipal Council or in the contractor; but on a construction of the Act he held that the person appointed to make the seizure could only be an officer of the Municipality and that Mandody was not such an officer. On this finding, namely, that the distraint was not in accordance with law, it is clear that the learned Subordinate Judge should have awarded some measure of damages to the appellant however small. In our opinion. however, his finding was not correct and the distraint made was in accordance with law.

Section 270-D (1) of the District Municipalities Act provides that:

> "If the fee leviable under sub-section (1) of section 270-B in respect of a vehicle or animal is not paid on demand, the person appointed to collect such fee may seize and detain such portion of the appurtenances or load of such vehicle or animal as will, in his opinion, suffice to defray the amount due; in the absence of any such appurtenances or load or in the event of this value being insufficient to defray the amount due, he may seize and detain the vehicle or animal."

Sub-section 270-D (2) provides that all property seized under sub-section 270-D (1) shall be sent within twenty four hours to the executive authority and shall be dealt with thereafter by him. The learned Subordinate Judge in his judgment has set out what was section 112 of the District Municipalities Act. This is in much the same terms as section 270-D. But a point which the learned Subordinate Judge does not seem to have noted is that this section with other sections was omitted by Sch. I to the Madras Motor Vehicles Taxation Act (III of 1931). It is clear, however, that the phrase "the person appointed to collect" is not used in a very technical sense. It must mean no more than the person who is put in charge of the cart or the bus stand, since only such a person could carry out the clear purpose of the provisions of the section, namely, the detention of a vehicle or animal or their appurtenances to defray the amount due. The only question therefore is whether Mandody was not the person appointed to collect or his authorised agent. Mr. Rajah Aiyar has referred to *Karuppanna Pillai* v. *Haughton*.[1] We are at a loss to see how this decision helps the appellant's case. It is not directly in point, but so far as it has any relevance to the question now in issue the decision was by implication that it was for the person to whom a municipality had sold the right to collect certain fees and not the Chairman of the Municipality to take the necessary steps to collect these fees, whether by litigation or otherwise. But whether it was for the Municipality or for the contractor to appoint the person to collect the fees, there seems to us no doubt in this case that Mandody's seizure of the bus was in accordance with law. In his letter, dated 2nd March, 1937, Ex. XXXV, to the Sub-Inspector of Police, Palghat Town, the

1. (1936) 70 M.L.J. 695: I.L.R. 59 Mad. 887.

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Commissioner refers to Mr. Migael as "The Municipal Contractor appointed to collect the fee"; and in his letter of the same date to Mr. Migael it is stated that "The contractor is directed to seize, detain, etc., any one of the buses belonging to the United Motors Service which use the stand". The learned Subordinate Judge was of opinion that even if the contractor could be regarded as the person appointed to collect the fees there was nothing to show that Mandodi was his authorised agent. In our opinion it would be more correct to say that there never has been any question but that Mandodi was the contractor's authorised agent. If authority from the Council was necessary the correspondence shows that the contractor was the person appointed to collect and, the seizure by his authorised agent was legal. If on the other hand the Council was divested of all powers relating to the collection of the fees by virtue of the sale of the right to collect them then the contractor could either collect them himself or appoint a person to do so. On this hypothesis also the seizure was in accordance with law. On the assumption that the Council had no power to direct the seizure, the fact that, wrongly or unnecessarily, they directed the person who had the power to make the seizure to make it will not render the seizure invalid. We have no doubt for these reasons that the distraint and sale of the bus was in accordance with law.

The appeal, therefore, fails and is dismissed with costs.

The defendant council has filed a memorandum of objections against the finding of the lower Court that the attachment was not in accordance with law, and against the order of the lower Court that the parties should bear their own costs. The first objection has been dealt with in the judgment on the appeal. With regard to the question of costs, the learned Subordinate Judge departed from the usual rule that costs should follow the event on the ground, in his own words, that "Both sides appear to have acted with great indiscretion, the plaintiff in not paying the dues under protest and the defendant in not filing suits". We do not agree that the defendants acted indiscreetly in recovering the dues in the manner provided by section 270-D of the Act instead of by filing a suit. On the contrary it was clearly the duty of the defendant to utilise the cheap and expeditious method of recovery provided by the Act.

The objection is, therefore, allowed and the defendant Council will be given its costs of the suit and the Memorandum of Objections.

Appeal dismissed and cross-objections allowed.

K.S.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE BELL AND MR. JUSTICE BYERS.

In the matter of Sri C. S. Venkatachariar, First Grade Pleader and Sri R. Sivaramakrishna Deekshathar, Second Grade Pleader, Chidambaram.*

F.B.

Venkatachariar and Sivaramakrishna Deekshathar, *In the matter of.*

Legal Practitioner—Counsel if can give evidence in a case in which he is engaged—Legal Practitioners' Act (XVIII of 1879), section 14—Subordinate Courts—When can institute proceedings and frame charges against a pleader appearing before it.

A person who is appearing as counsel should not give evidence as a witness. If in the course of the proceedings it is discovered that he is in a position to give evidence and it is desirable that he should do so, his proper course is to retire from the case in his professional capacity.

If in the course of a proceeding a subordinate Court has reason to think that a pleader has committed misconduct in the course of his professional duty, the presiding officer of the Court can under section 14 of the Legal Practitioners' Act institute proceedings against him and inquire into the alleged misconduct. In such a case even though no charge is made by a person concerned, the framing of the charge need not be directed by the High Court.

This case came on for hearing under section 13 (*b*) of the Legal Practitioners Act on the Pleaders abovenamed, calling upon them to show cause why they should not be dealt with under the Disciplinary Jurisdiction of the High Court for their grossly improper conduct in the discharge of their professional duty.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) in support of the notice.

Complainant in person.

V. V. Srinivasa Aiyangar for *C. R. Rajagopalachari* for Respondent.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This case presents some unusual features. The Court is called upon in the first place to consider whether the respondent, Mr. C. S. Venkatachariar, a pleader practising in the Court of the District Munsiff of Chidambaram, has been guilty of professional misconduct. In the second place, it is called upon to decide whether the person who lodged the complaint against him, Mr. R. Sivaramakrishna Deekshathar, another pleader practising in that Court, is also guilty of professional misconduct. Charges were framed by the District Munsiff of Chidambaram, against both the respondent and the complainant. The District Munsiff has presented a report to the effect that the respondent is not guilty of the charges framed against him, but that the complainant is. This report is concurred in by the District Judge of South Arcot. The District Munsiff considered that the conduct of the complainant had been such as to warrant the cancellation of his sanad. The District Judge considered, however, that suspension for three years would be a fitting penalty.

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*R.C. No. 2 of 1942. 23rd February, 1942.

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S. Nataraja Aiyar, the complainant's son, is married to one Jayalakshmi Ammal and the marriage has proved to be an unhappy one. On the 14th August, 1939, on the instructions of Jayalakshmi Ammal, a pleader wrote to her husband demanding the payment of Rs. 15 per month for her maintenance. This demand was not complied with and the wife then instituted proceedings under section 488 of the Code of Criminal Procedure. On the 1st November, 1939, the Magistrate ordered the husband to pay to his wife Rs. 5 per month. In those proceedings the complainant, in his professional capacity, represented his son. The passing of this order was followed by the institution of a suit by the husband in the Court of the District Munsiff of Chidambaram for a decree setting aside the order on the ground that the wife had committed adultery. The complainant, again acting in his professional capacity, appeared on behalf of his son and gave evidence in support of his son's case. In fact he was the only witness in the case. Why the complainant gave evidence on behalf of his son in a case in which he was appearing in his professional capacity has not been explained. A person who is appearing as counsel should not give evidence as a witness. If in the course of the proceedings it is discovered that he is in a position to give evidence and it is desirable that he should do so, his proper course is to retire from the case in his professional capacity. The charges framed against the complainant have, however, nothing to do with this incident and there is no need to discuss it further.

On the 20th January, 1941, the husband's suit was dismissed, but on the 27th February, he applied for a review of the District Munsiff's judgment. This application was dismissed by an order, dated the 8th March. A month before, the complainant had filed a petition in the District Munsiff's Court charging the respondent with professional misconduct in that he had misled the Court and had tutored his client to give false evidence in the suit. On the 10th February the complainant filed a second petition in which he charged the respondent with a further act of professional misconduct. On this occasion the charge was that the respondent had filed a certificate in which he stated that he had received his fee, whereas he had not.

In affidavits filed in denial of the charges made against him, the respondent alleged that the complainant had intimated that he would drop the complaints of professional misconduct if he would pay a sum of Rs. 75 and that he would be prepared to accept even less than this amount if the respondent did not oppose the application for a review of the judgment dismissing the suit filed by the complainant's son for a decree setting aside the order passed against him under section 488 of the Code of Criminal Procedure. This allegation of the respondent was supported by the affidavits of four other pleaders practising in the Court. They testified to the fact that the complainant had made these proposals and that the respondent had refused to entertain them. In this state of affairs the District Munsiff framed four charges against the respondent of having made misrepresentations to

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the Court with regard to certain Exhibits in the case and a fifth charge of having tutored his client to give false evidence. There was a sixth charge, but this was merely a charge of professional misconduct based on the other charges. Against the complainant the District Munsiff framed three charges. The first was that he demanded money from the respondent "as consideration for not presenting or representing or pressing" the petition which he had presented against the respondent in connection with the alleged false certificate. The second charge was that as additional consideration for not pressing the petition against the respondent he should not oppose the application for review. The third charge was a general charge of professional misconduct, again apparently based on the earlier charges.

It is difficult to understand why the District Munsiff framed charges of misrepresentation against the respondent. The misrepresentations which were alleged to have been made were made in open Court in respect of documents before the Court and the facts were all within the knowledge of the District Munsiff. He has stated in his report that he was not misled by the respondent. The report also shows that the charge against the respondent of having tutored his client to give false evidence is equally groundless. We have no hesitation in accepting the report of the District Munsiff that the respondent is not guilty of any of the charges brought against him in this case, and therefore the charges against him will be dismissed.

After adopting an obstructive attitude the complainant failed to appear at the hearing of the case against him. He had been given far more latitude in the matter of adjournments than he should have been given, and the fact that he did not attempt to refute the allegations made against him in itself points to the truth of the testimony of the witnesses who were called to prove the charges. The four pleaders who had sworn affidavits all gave evidence, and we agree with the District Munsiff that there is no reason to disbelieve them. They are practitioners of standing. In fact the complainant, who has appeared in person before us, has not suggested that their evidence is in any respect untrue. He has confined himself to the contention that the District Munsiff had no jurisdiction to frame charges against him or to hold an inquiry. He states that unless a charge is made by a person concerned, a Court subordinate to the High Court has no power to frame a charge against a practitioner. The framing of the charge, he says, must be directed by the High Court in the absence of a formal petition to a Subordinate Court. The contention ignores the plain wording of section 14 of the Legal Practitioners' Act. The complainant has, however, insisted that the decision of the Rangoon High Court in *In the matter of S., a Lower Grade Pleader, Pyapon,*[1] assists him. An examination of the judgment in that case shows that the complainant has misunderstood it. There the District Judge of Pyapon framed a charge of professional misconduct against a practitioner because, while practising as a pleader, he was carrying on the business as a taxi-cab

1. A.I.R. 1936 Rang. 189.

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owner. The Rangoon High Court held that the District Judge had no right to frame the charge as the matter did not arise in Court, and the charge concerned something which the respondent was doing outside the Court. In delivering the judgment Page, C.J., referred to the decision of the Rangoon High Court in *U Thein Nyun* v. *District Superintendent of Police, Maubin*,[1] where it was held that, if in the course of a proceeding a subordinate Court had reason to think that a pleader had committed misconduct in the course of his professional duty, the presiding officer of the Court can under section 14 of the Legal Practitioners' Act institute proceedings against him and inquire into the alleged misconduct. That this is so is really not open to question.

The complainant then says that, in any event, the District Munsiff had no right to hold the inquiry against him because he might have been a witness in the charge against the respondent. He was not a witness, nor could he have been a witness. He was lawfully holding an inquiry into the complainant's conduct and therefore he was entitled to take into consideration what had transpired before him in the course of the suit filed by the complainant's son.

We consider that the charges against the complainant have been fully proved and as he has shown himself to be unworthy of remaining a member of the legal profession, his sanad will be cancelled.

K.S. ——— *Sanad cancelled.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Syed Abdul Huq Sahib .. *Appellant** (*Plff.*)

v.

Raj Muhammad Kabuli and others .. *Respondents* (*L. Rs. of Deft.*).

Syed Abdul Huq Sahib *v.* Raj Muhammad Kabuli.

Transfer of Property Act (*IV of* 1882), *section* 55—*Vendor selling property*—*Promissory note for balance of consideration unpaid*—*Vendor's lien on the property*—*Payment to account on the note*—*Period of limitation for bringing a suit*—*Whether can be extended*—*Limitation Act* (*IX of* 1908), *article* 132.

An unpaid vendor is given a lien on the property by section 55 of the Transfer of Property Act and that lien continues while the vendor has an enforceable claim against his vendee in respect of the purchase consideration.

Where a property was sold to a person by the plaintiff for an amount of which a major portion was paid immediately and for the balance a promissory note was executed and payments were made towards it which were suitably acknowledged, on the question whether the 12 years' period under article 132, Limitation Act, can be computed from the date when the last payment was made,

Held, that when the last payment to account on the promissory note was made, a fresh period of limitation commenced to run. The position was the same as if a new promissory note had been given on that date for the balance outstanding, and therefore the unpaid vendor had twelve years from that date on which to enforce his statutory lien.

Decision in L.P.A. No. 150 of 1924, unreported followed.

1. (1935) I.L.R. 13 Rang. 737.

*L.P.A. No. 42 of 1941. 3rd August, 1942.

Syed Abdul Huq Sahib *v.* Raj Muhammad Kabuli.

Appeal under clause 15 of the Letters Patent against the decree of the Hon'ble Mr. Justice Chandrasekhara Ayyar, dated 18th August, 1941, and passed in S.A. No. 236 of 1939, preferred against the decree of the District Court of Trichinopoly in Appeal Suit No. 346 of 1937, (O.S. No. 341 of 1936 on the file of the Court of the District Munsiff, Trichinopoly).

K. V. Sesha Aiyangar for Appellant.

K. S. Narayana Aiyangar for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The question for decision in this appeal is one of limitation. The appellant is the plaintiff in the suit and the Courts below have held that his action is barred by the law of limitation. We do not share this opinion.

On the 15th January, 1920, the plaintiff sold certain immovable property to one Mohamed Ghouse for the sum of Rs. 1,750 of which Rs. 1,150 was paid immediately. For the balance of Rs. 600, the purchaser executed a promissory note in favour of the vendor. On the 16th July, 1920, Mohamed Ghouse mortgaged the property to the Catholic Permanent Fund. The mortgage debt was not repaid and the mortgagee was compelled to file a suit on the mortgage. As the result, a decree was obtained and in execution the property was sold, the respondent being the purchaser. On the 30th December, 1920, 9th January, 1921 and 5th July, 1924, Mohamed Ghouse made payments to account of the amount due on the promissory note which he had executed in favour of his vendor for Rs. 600. It is not disputed that these payments were suitably acknowledged and that each operated to extend the period of limitation.

In 1927, the appellant instituted a suit against Mohamed Ghouse to recover the sum of Rs. 187-7-0, the balance of the amount due on the promissory note. He obtained a decree, but in execution he was not able to realise anything. Consequently he filed the suit out of which this appeal arises, claiming that as the unpaid vendor he was entitled to a lien on the property by reason of the provisions of section 55 of the Transfer of Property Act. The suit was brought within twelve years of the last payment towards the amount due on the promissory note. Article 132 of the Limitation Act prescribes a period of twelve years to enforce payment of money charged upon immovable property, the twelve years commencing to run from the date when the money sued for became due. The District Munsiff and on appeal the District Judge held that as the suit had not been brought within twelve years of the date of sale it was out of time. The appellant filed an appeal from the District Judge's decision to this Court, and Chandrasekhara Ayyar, J., agreed that the suit had been filed out of time, but he gave a certificate which has permitted this appeal being filed under clause 15 of the Letters Patent.

In *Authinarayana Aiyar* v. *Krishnaswami Aiyar,*[1] Devadoss, J., held that the statutory period for the enforcement of a charge could not be extended by agreement of parties and unless the

1. 1924 M.W.N. 755.

Syed Abdul Huq Sahib v. Raj Muhammad Kabuli.

Leach, C.J.

suit was brought within twelve years from the date of sale the statutory lien ceased to exist. This decision was reversed on appeal by Wallace and Madhavan Nair, JJ., in L.P.A. No. 150 of 1924, but their judgment does not appear to have been reported. Chandrasekhara Ayyar, J., has referred to these decisions and while not doubting the correctness of the judgment of Wallace and Madhavan Nair, JJ., he considered that the period of limitation fixed by article 132 of the Limitation Act could not be extended without an acknowledgment of liability being made expressly in respect of the statutory charge.

In our opinion, this is not the correct view of the law. An unpaid vendor is given a lien on the property by section 55 and that lien continues while the vendor has an enforceable claim against his vendee in respect of the purchase consideration. On the 5th July, 1924, when the last payment to account was made by Muhammad Ghouse, another period of limitation commenced to run. The position was the same as if a new promissory note had been given on that date for the balance outstanding, and therefore the unpaid vendor had twelve years from that date in which to enforce his statutory lien. For these reasons, we hold that the suit was filed in time and the appeal will be allowed. As the respondent has raised other defences in his written statement the case will have to be remanded to the trial Court for trial on the other issues. We wish to make it clear that our decision on the question of limitation has no bearing on the question of the maintainability of the suit.

The appellant is entitled to his costs before the District Judge, Chandrasekhara Ayyar, J., and in this Court. The costs of the trial Court will abide the result of the further hearing. The appellant will be entitled to return of the court-fees paid on his memoranda of appeal.

K.C. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Periya Perumal Ammal .. *Petitioner** (*Petitioner*)

v.

Minor Veluchami Reddy .. *Respondent* (*Respondent*).

Periya Perumal Ammal v. Veluchami Reddy.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 19 *and* 20—*Sale in execution with leave to bid and set-off after commencement of Act—Stay of execution before confirmation—Scaling down—Procedure.*

A decree-holder being given leave to bid and set-off, a sale in execution was held after the commencement of Act IV of 1938. Before the sale was confirmed, the judgment-debtor filed applications under sections 20 and 19 of Act IV of 1938 and in due course stay was ordered. In spite of the stay the decree-holder was permitted to give up the balance due under the decree and record satisfaction by reason of the sale and the petition under section 19 was dismissed on the ground that there was no longer a decree debt subsisting. On revision,

Held: When the execution proceedings are stayed and the petition under section 19 is filed at a time when there is a subsisting decree-debt, the Court is obliged to apply the procedure laid down in section 19 and scale

*C.R.P. No. 1870 of 1940. 8th July, 1942.

down that decree. Though there is no procedure under the Act for setting aside a sale, held after the commencement of the Act, the sale cannot be confirmed regardless of the effect of the scaling down application. If the scaling down results in the decree-debt being reduced to something below the purchase price, the decree-holder purchaser will have to put into Court the balance before the sale can be confirmed. If instead, he elects to have the sale set aside that is his own business. The Court has no power to treat as satisfied the decree which at the time of the stay was unsatisfied and allow the set-off to be completed on the basis of the decree which the Court had to scale down.

Periya Perumal Ammal *v.* Veluchami Reddy.

Decision in C.M.S.A. No. 267 of 1940, explained.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the Order of the Court of the District Munsiff of Tirumangalam, dated 3rd March, 1939 and made in M.P. No. 587 of 1938 in O.S. No. 283 of 1936 on the file of the said Court of the District Munsiff of Tirumangalam.

V. Meenakshisundaram for Petitioner.

R. Ramasubbu Aiyar for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The petitioner was the judgment-debtor under an appellate decree, dated 18th March, 1938. In execution of that decree the petitioner's property was sold, the decree-holder being given leave to bid and set-off. The sale price was something less than the full decree amount. On the 27th July, 1938, before the sale was confirmed, the petitioner filed applications under sections 20 and 19 of Act IV of 1938 and in due course the stay was ordered. The position therefore was that when the sale had been held, the set-off, though permitted, had not been completed by the confirmation of the sale—Vide *Nataraja Pillai* v. *Rangasami Karumandar*[1] and further proceedings in execution were stopped at this stage. On the 3rd March, 1939, in spite of this stay, the decree-holder was permitted to give up the balance due under the decree and record satisfaction by reason of the sale which had not yet been confirmed and the petition under section 19 was dismissed on the ground that there was no longer a decree debt subsisting. It seems to us impossible to support this order. Our attention has been drawn to the decision of one of us in C.M.S.A. No. 267 of 1940 as authority for the view that when a sale has been held but not yet confirmed at the time when an application under section 19 is filed, the judgment-debtor has no remedy in respect of the sale. No such principle was laid down in the decision referred to. Clearly when the execution proceedings are stayed and the petition under section 19 is filed at a time when there is a subsisting decree debt, the Court is obliged to apply the procedure laid down in section 19 and scale down that decree. The question then arises: what is the result of the scaling down with reference to the sale held but not yet confirmed? Clearly there is no procedure under the Act for setting aside a sale held after the commencement of the Act. But that does not mean that the sale has to be confirmed regardless of the effect of the scaling down application. The position being that the decreeholder has the right to set-off against the

1. (1941) 2 M.L.J. 682.

Periya Perumal Ammal v. Veluchami Reddy.

Wadsworth, J.

purchase price the amount due to him under the decree if the procedure of scaling down that decree results in the decree-debt being reduced to something below the purchase price, clearly, the decreeholder will have to put into Court the balance before the sale can be confirmed. If he elects to have the sale set aside rather than put into Court the balance, that is his own business. But if he wishes to get the sale confirmed in the ordinary course, he must either have to his credit under the decree a sufficient amount to meet the price which he has bid or he must deposit the balance. Certainly the Court has no power to treat as satisfied a decree which at the time of the stay was unsatisfied and allow the set-off to be completed on the basis of the decree which the Court had to scale down.

In the result therefore the revision petition is allowed with costs and the application is remitted to the lower Court for disposal in the light of this judgment.

K.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Cherukuri Indiradevi being minor by next friend and father, N. C. Krishnayya Naidu .. *Appellant** (*Plaintiff*)

v.

Mamidipalli Audinarayanamurthy and another .. *Respondents* (*Defts.*).

Indira Devi v. Audinarayanamurthy.

Usurious Loans Act (X of 1918), section 3, Explanation I (Madras Amendment)—"Agriculturist"—Meaning—Madras Debtors' Protection Act (as amended in 1935), section 6—Applicability.

The word "agriculturist" in the Madras amendment to Explanation I of section 3 of the Usurious Loans Act is used in its ordinary sense of a person following the calling of agriculture.

Section 6-A of the Madras Debtors' Protection Act as amended in 1935 cannot apply to a transaction entered into before the commencement of the amending Act.

Appeal against the decree of the Court of the Subordinate Judge of Ellore in O.S. No. 16 of 1939.

A. Suryanarayaniah for Appellant.

G. Balaparameswari Rao for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The appellant sued on a mortgage bond stipulating for compound interest at ten per cent. The date of the bond is 16th September, 1933. The two defendants are father and son. The 1st defendant is described as a Taluk Head Accountant. The 2nd defendant is a minor. The lower Court held that the 1st defendant was disentitled to the benefits of Act IV of 1938 by reason of the fact of his payment of profession tax and held that as a consequence under section 6 of the Act his son the 2nd defendant was

*Appeal No. 305 of 1940. 30th June, 1942.

also debarred from the benefits of the Act. We have held that section 6 has no application to a family consisting only of a father and son, but that it is intended to apply to families in which there are several branches one or more of which is composed of father and son. There is, however, no appeal on behalf of the 2nd defendant. The lower Court has reduced the rate of interest from ten per cent. compound to ten per cent. simple quoting in support of that decision the Usurious Loans Act as amended. But the purport of the legal provision so described occurs not in the amendment of the Usurious Loans Act but in section 6-A of the Madras Debtors' Protection Act as amended in 1935. This amendment cannot apply to the present transaction which was of 1933, seeing that the amendment is applicable only to transactions entered into after the commencement of the amending Act. The Madras amendment to explanation I of section 3 of the Usurious Loans Act provides that in the cases of loans to agriculturists, if compound interest is charged, the Court shall presume that the interest is excessive. In this clause the word "agriculturist" is used presumably in its ordinary sense of a person following the calling of agriculture. There is no evidence that the 1st defendant is such a person and presumably he is not an agriculturist in the ordinary sense of the word, for he is admittedly employed as a Taluk Head Accountant. It follows that so far as the 1st defendant is concerned, the reduction of interest is unjustified and the plaintiff is entitled to a decree with compound interest at the contract rate up to the date fixed for payment by the lower Court. We have some difficulty in dealing with the case of the 2nd defendant. Whether or not, the minor son of a Government servant who owns agricultural lands can be described as an agriculturist for the purposes of the Usurious Loans Act, must depend upon the circumstances of the family about which we know very little. But as it appears in this case that upon a right view of the law, the second defendant could have had the benefits of Act IV of 1938, which we are unable to give in the absence of an application on his behalf, we are of opinion that we should not be justified in enhancing the decree against him on the theory that he is not an agriculturist under the Usurious Loans Act.

Indira Devi *v.* Audinarayanamurthy.

Wadsworth, J.

The appeal is therefore allowed so far as the 1st defendant is concerned with costs and is dismissed with costs of the 2nd defendant.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Jikkini Bibi Sahiba .. *Appellant** (1st *Deft.-Applt.*)

v.

Ranganayaki Ammal and another . *Respondents* (*Plffs.-Respts.*).

Madras Agriculturists' Relief Act (IV of 1938), *section* 3 (ii), *Proviso C—Aggregate annual rental value of house properties—Computation to be on share of the debtor in the properties—Section* 4 (d)*—Mortgage of*

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*S.A. No. 258 of 1941. 10th April, 1942.

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houses along with other house sites the superstructure over which belongs to another—Mortgage-debt not a debt contracted on security of "house property" alone.

In computing the aggregate annual rental value of properties to find out whether a debtor was disqualified under Proviso C to section 3 (*ii*) of Act IV of 1938 from claiming the benefits of the Act, only the proportionate share of the value of the house in which the debtor holds only a share and not the whole annual rental value of the house should be taken into account.

Decision in C.M.P. Nos. 5740 to 5747, etc. of 1941, followed.

Where a mortgagor has given as security for his debt some houses and other lands and not the buildings standing thereon (which belonged to third parties) it cannot be said that he contracted the debt on the security of "house property" alone as contemplated in section 4, clause (*d*) of Madras Act IV of 1938 so as to exempt the debt from the operation of the Act.

Appeal against the decree of the District Court of Madura in A.S. No. 270 of 1939 preferred against the decree of the Court of the District Munsiff of Madura Town in O.S. No. 91 of 1939.

V. Meenakshisundaram for Appellant.

K. S. Rajagopalachari for Respondents.

The Court delivered the following

JUDGMENT.—This appeal has been brought by the defendant in a mortgage suit from a decree disallowing his claim to have the mortgage debt scaled down in accordance with the provisions of the Madras Agriculturists' Relief Act. The respondents put forward two grounds for excluding the appellant from the benefits of the Act, namely, that the appellant was disqualified under proviso C to section 3 (*ii*) of the Act from claiming to be an agriculturist, and secondly, that the debt itself was exempted from the operation of the Act by section 4 (*d*).

As regards the first ground the relevant facts are these. The appellant was assessed within the period mentioned in the proviso to tax on property of an annual rental value of Rs. 500-8-0 of which she was the sole owner. She appears to have been assessed also to house-tax in respect of a house in which she was entitled to a seventh share. Ex. G-1 the certificate issued by the Commissioner, Madura Municipality, under section 27 of the Act is defective in that it does not state that the appellant and her co-sharers were actually assessed to such tax during the relevant period but the parties clearly proceeded in the Court below that such assessment was in fact made, and this second appeal must be disposed of on that footing. The certificate however discloses that the house in question stood in the names of the appellant and her co-sharers in the municipal register and that its annual value during the period was Rs. 647. It will thus be seen that if the properties in respect of which the appellant was assessed to tax were taken to include the house in its entirety, the aggregate rental value of such properties would be much more than Rs. 600 and the appellant would be disqualified; whereas if such properties were taken to include only the appellant's seventh share in the house the aggregate rental value would amount to only Rs. 599-15-0 which falls just below the limit specified in the proviso which would not therefore operate to exclude the appellant from the

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definition of an agriculturist. The Court below took the view, relying on *Swaminatha Odayar* v. *Srinivasa Aiyar*[1] that proviso C "does not deal with interest in property but with assessment to property" and held that the appellant must be taken to have been assessed to the extent of the full annual rental value of the house as she and her co-sharers were jointly and severally liable for the property tax. It accordingly refused to scale down the debt.

The learned counsel for the appellant attacked the correctness of this view pointing out that the decision relied on by the learned District Judge is not applicable to the facts of this case. It must be admitted that the case of *Swaminatha Odayar* v. *Srinivasa Aiyar*[1] has not much bearing upon the question which arises for determination here. All that it decided with reference to proviso C was that only persons who have been assessed to property tax are excluded from the benefits of the Act and that a person could not be said to be so assessed unless the assessment was made in his name. No question arises here as to whether the appellant can be said to have been assessed to property tax or not, for, admittedly the assessment was made in her name. The only question is whether in computing the aggregate annual rental value of the properties in respect of which she has been assessed, the whole annual rental value of the house in which she holds only a seventh share should be taken into account or only the proportionate share of such value. On this question the decision referred to above throws no light. The point however appears to have been recently decided favourably to the appellant by a Division Bench of this Court in C.M.P. Nos. 5740 to 5747 and 5905 to 5907 of 1941. The petitioners who claimed the benefit of the Act in that case were owners of a half share of a house which had been assessed to tax during the relevant period. The annual rental value of the house exceeded Rs. 600 but the rental value of the petitioner's share was less than that sum and the question arose whether the petitioners were excluded from the benefits of the Act by virtue of proviso C to section 3 (*ii*) of the Act. Abdur Rahman, J., who delivered the judgment of the Court observed:

> "If the words 'buildings or land' are construed to refer in the proviso C to the entire buildings or lands it is clear that the petitioners were not the owners of buildings and lands in their entirety. If, on the other hand, the words 'buildings and lands' are to be so construed as to cover a share in such buildings or land, they could certainly show that one half of the share in the property belonged to the 1st defendant and that they were not the owners of that share and could not in fact have been assessed or be rendered liable to property or house-tax for that share . . . If the words 'buildings and lands' are to include the *shares* in buildings and lands, the aggregate rental value of the land must, in that case, be the annual rental value of those shares. The unit of such assessment cannot, in such cases, be regarded to be the whole of the property. It will otherwise mean that a person who happens to be an owner of an infinitesimal share in the property would be disqualified under the proviso although this was not obviously the intention of the Legislature."

Respondents' learned counsel however, drew attention to the difference in language between proviso D which excludes from the definition of an agriculturist

1. (1939) 2 M.L.J. 495.

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"a landholder of an estate under the Madras Estates Land Act, 1908, or of a share or a portion thereof in respect of which estate, share or portion a sum exceeding Rs. 500 is paid as peshkush"

and proviso C ,which refers to no share or portion of a building or lands assessed to property tax, and pointed out that this marked contrast was apparently not brought to the notice of the learned Judges. The criticism is not without force and the opposite view is certainly arguable as has often been found to be the case with reference to several provisions of the Act. However that may be, the decision being that of a Division Bench and clearly in point must be taken to conclude the question in favour of the appellant.

The next question is whether the suit debt falls within the exemption in section 4 (*d*) of the Act as being a "debt contracted on the security of house property alone in a municipality". The mortgage comprises five items of property of which items 3 and 5 are described in the deed as house sites (*manai*). The other items are either buildings and sites appurtenant to them. It appears however that even on items 3 and 5 which are shown as sites there are buildings bearing distinct door numbers but these superstructures belong to third parties, the mortgagor being entitled only to the sites underneath, and that was the reason why these two items were included in the mortgage as sites. The trial Court held that the mere fact that the mortgagor was not also the owner of the superstructure could not exclude these items from the category of 'house property' and that therefore the debt was one contracted on the security of house property alone within the meaning of section 4 (*d*) of the Act. The learned District Judge however thought it unnecessary to decide this question in view of his finding on the first point. Having heard arguments on the question which is one of law, I have thought it desirable to decide it now in order to obviate another appeal to this Court on this point.

In my judgment, the view expressed by the learned District Munsiff cannot be supported. The mortgagor having given as security for his debt only the lands referred to as items 3 and 5 and not the buildings standing thereon which, as already observed, belong to third parties, it cannot be said that he contracted the debt on the security of "house property" so far as these items are concerned. It may be that the lands and the buildings thereon can, as a matter of classification be viewed as constituting together "house property", but what section 4, clause (*d*) contemplates is a debt contracted on the security of house property, that is to say, a debt for which the debtor has offered as security house property belonging to him. What has been given as security so far as these two items are concerned is the land underneath the superstructures which belong to third parties and form no part of the security as is made clear by the reference to these items in the deed as sites and not houses. I am therefore of opinion that the suit debt does not fall within section 4, clause (*d*) and is liable to be scaled down in accordance with the provisions of the Act.

The appeal is accordingly allowed and the case is remanded to the trial Court for disposal according to law. The appellant will have her costs here and in the lower appellate Court. The parties will pay and receive proportionate costs in the first Court. Leave refused.

Jikkini Bibi Sahiba *v.* Ranganayaki Ammal.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Kosuru Ademma .. *Petitioner** (*4th Deft.*)

v.

Chevuru Subbamma .. *Respondent* (*Plff.*).

Ademma *v.* Subbamma.

Decree—Assignment by decree-holder—Avoidance by creditors of assignor—Permissibility—Civil Procedure Code (V of 1908), section 47—"Representative"—Meaning—Assignment of decree proved fraudulent—Objection to execution by creditor of assignor—Transfer of Property Act (IV of 1882), section 53—Applicability.

If an assignment of a decree is made by a decree-holder to defraud his own creditors it may not be open to him to object to the assignment during his lifetime. But it is entirely incorrect to say that his creditors have no right to attach the decree and to allege that the assignment was fictitious and was not binding on them.

The term "representative" in section 47, Civil Procedure Code, is not confined to legal representatives but would also include the representatives in interest who may have obtained or who may allege to have obtained the decree-holder's interest by transfer or assignment. If that assignment is challenged and it is contended by a creditor that the assignee is not the representative of the decree-holder and that so far as the decree-holder is concerned the decree cannot be taken to have been assigned and the interest in the decree still continues to vest in the assignor the question would have to be gone into by the executing Court. And if the Court finds that the assignment was fraudulent it would refuse to recognise the assignment of the decree at least so far as the objecting creditor is concerned. And section 53 of the Transfer of Property Act will not stand in the way of the objector in such a case.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Kavali, dated 10th March, 1941, and passed in S.C.S. No. 472 of 1939.

S. Ramachandran and *B. V. Ramanarasu* for Petitioner.

K. Kuppuswami for Respondent.

The Court delivered the following

JUDGMENT.—A decree was obtained by one P. Rama Naidu against Ramanappa Setti and his minor sons in the Court of the District Munsiff of Kavali, in O.S. No. 91 of 1932. Rama Naidu assigned this decree in 1935 to one Kotappa Naidu who assigned it in his turn to the plaintiff on the 11th July, 1935. The assignment was recognised by the Court on the 26th August, 1935. But before this a decree was obtained by the 4th defendant against Kotappa Naidu in O.S. No. 815 of 1932. Ramanappa Setti was adjudged insolvent on his own petition in I.P. No. 1 of 1934. A private composition was arrived at during the course of these proceedings between the insolvent and

*C.R.P. No. 1497 of 1941. 9th April, 1942.

Ademma v. Snbbamma.

his creditors under which defendants 1, 2 and 3 were appointed trustees. They were to take possession of a portion of the insolvent's property and to sell the same with the object of distributing the sale proceeds amongst the creditors. They appear to have done so and had some money in their hands when the plaintiff proceeded to execute her decree assigned in her favour on the 26th August, 1935 and to attach the money in the hands of defendants 1 to 3. But before she could realise any money from them the 4th defendant attached the amount (Rs. 140-6-11) on the 8th February, 1939, alleged to be due to her judgment-debtor Kotappa Naidu by Ramanappa Setti which was in the hands of the trustees and realised it from them in execution of her decree. The plaintiff thereupon brought the suit out of which the present revision arises for the recovery of the sum realised by the 4th defendant from the trustees of Ramanappa Setti insolvent (defendants 1 to 3) on the ground that the decree had been assigned to her by Kotappa Naidu and that the 4th defendant could not therefore recover any money from the trustees, she (the plaintiff) alone being entitled to recover the same from them in execution of the decree assigned to her.

It was contended on behalf of the 4th defendant that the assignment by Kotappa Naidu was made fictitiously and with the object of defrauding her and that she was entitled to recover the money due to Kotappa Naidu by the trustees in spite of the assignment in favour of the plaintiff. The District Munsiff held that the assignment by Kotappa in favour of the present plaintiff was without consideration and fictitious and made with the object of defrauding the 4th defendant. But in view of the assignment of the decree made in favour of the plaintiff she alone was found entitled to realise the amount of the decree from the trustees and a decree was passed in her favour. The 4th defendant felt aggrieved by the decree and has come up to this Court in revision.

In support of his decision the learned District Munsiff relied on the decisions in *Gurdial Singh* v. *Gurbakhsh Singh*[1] and on *Palaniappa Chettiar* v. *Subramania Chettiar*.[2] These cases cannot help the plaintiff. The District Munsiff failed to appreciate that the decision in these cases was arrived at between the assignors and the assignees of the decrees and had nothing whatever to do with a third party who was attacking the action of the assignor on the ground that the assignment was fictitious and fraudulent. If an assignment of a decree is made by a decree-holder to defraud his own creditors it may not be open to him to object to the assignment during his lifetime (for which see *Bada Kristam Naidu* v. *Durvada Patrudu*[3]); but it is entirely incorrect to say that his creditors have no right to attach the decree and to allege that the assignment was fictitious and was not binding on them. There is no principle or rule of law which debars the assignor's creditors from attacking the assignment. Fraud vitiates the most solemn documents and even proceedings of

1. (1926) I.L.R. 8 Lah. 35: A.I.R. 1927 Lah. 110.
2. (1924) 48 M.L.J. 419: I.L.R. 48 Mad. 553.
3. (1927) 53 M.L.J. 568.

Court and I cannot see how the 4th defendant could be held to be debarred from attacking the validity of the assignment of the decree and from showing that her debtor was still in fact the owner of the decree obtained by him against Ramanappa Setti. Ademma *v.* Subbamma.

Section 47, Civil Procedure Code, lays down that

"Where a question arises as to whether any person is or is not the representative of a party, such question shall for the purposes of this section be determined by the Court."

The term "representative" in this section is not confined to legal representatives but would also include the representatives in interest who may have obtained or who may allege to have obtained the decree-holder's interest by transfer or assignment. If that assignment is challenged and it is contended by a creditor that the assignee is not the representative of the decree-holder and that so far as he (the decree-holder) is concerned the decree cannot be taken to have been assigned and the interest in the decree still continues to vest in the assignor the question would apparently have to be gone into by the executing Court. And if the Court finds that the assignment was fraudulent it would refuse to recognise the assignment of the decree at least so far as the objecting creditor is concerned.

The only contention advanced on behalf of the respondent in reply was that an objection of this nature could not be relied on on behalf of the 4th defendant as this was not a suit under section 53 of the Transfer of Property Act; but the learned counsel for the respondent forgets that it was his own client who had brought the suit for the recovery of money and it is always open to a defendant to show that the transaction was fraudulent and that the plaintiff was not entitled to execute the decree assigned in his favour. Section 53 of the Transfer of Property Act cannot in such a case stand in the defendant's way. This was held by a Full Bench of this Court in *Ramaswami Chettiar* v. *Mallappa Reddiar*.[1]

I must, for the above reasons, vacate the decree passed by the District Munsiff and dismiss the suit. The 4th defendant will have her costs both in this Court and in the Court below.

B.V.V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

The Hindu Religious Endowments Board, Madras .. *Appellants** (1st *Deft.*)

v.

Dosapati Ramiah, trustee of Sri Venugopalaswami Varu and another .. *Respondents* (*Plff. & 2nd Deft.*).

Madras Hindu Religious Endowments Act (*II of* 1927), *section* 68—*Property endowed for* nitya naivedya *and* deeparathana—*If special endowment or general endowment of temple, liable to be proceeded against for contribution payable by the temple under section* 68. H.R.E. Board, Madras *v.* Ramiah.

1. (1920) 39 M.L.J. 350: I.L.R. 43 Mad. 760 (F.B.).

*S. A. No. 484 of 1941. 1st July, 1942.

H R.E. Board, Madras *v.* Ramiah.

An endowment for *nitya naivedya* and *deeparadhana* in a temple is a general endowment for the temple and cannot be considered to be a special endowment. Accordingly properties so endowed are liable to be proceeded against for the contribution payable by the temple under section 68 of the Madras Hindu Religious Endowments Act, 1926.

Appeal against the decree of the Court of the Subordinate Judge of Tenali in A.S. No. 28 of 1940 preferred against the decree of the Court of the District Munsiff of Repalle in O.S. No. 18 of 1934.

P. V. Rajamannar and *M. Seshachalapathi* for Appellants.

K. Kameswara Rao and *U. G. Krishnamurthi* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant before this Court is the 1st defendant, the Hindu Religious Endowments Board, Madras. The plaintiff was the trustee of the Sri Venugopalaswami Varu temple of Alapadu village. As he failed to pay the contributions payable by the temple under section 68 of the Endowments Act, a requisition was sent to the Collector under section 70 of that Act and the plaint mentioned *A* and *B* schedule properties were attached by him. The plaintiff thereupon filed the suit for a declaration that the *A* schedule properties alone were the properties of the temple and the *B* schedule properties were specially endowed properties and that he was liable to pay only a proportionate share of the contribution payable on *A* schedule properties and for an injunction restraining the Board from enforcing the order against the *A* schedule properties in respect of the entire contribution. The 2nd defendant is the archaka of the temple. He claimed the *B* schedule properties as his own and contended that they were not liable to be proceeded against for the contribution.

The learned District Munsiff dismissed the suit finding that all the properties were temple properties and they were liable to be proceeded against for the entire contribution due to the Board. On an appeal, preferred by the plaintiff and the cross-objections of the 2nd defendant the appellate Court holding that the *B* schedule properties belonged to the 2nd defendant and could not be proceeded against for the contribution gave a decree declaring that the plaintiff was not liable to pay any contribution so far as the *B* schedule properties were concerned and restraining the Board from collecting the said contribution from the plaintiff.

The points for determination now are (1) whether the *B* schedule properties are the properties of the temple or not and could not be proceeded against for the contribution levied by the Board, and (2) whether the plaintiff is entitled to the injunction prayed for.

That the *B* schedule properties are to be enjoyed by the archaka so long as he performs the archaka service and offers *nitya naivedya deeparadhanam* to the idol is the case of the

plaintiff and 2nd defendant as well. P.W. 1 the trustee stated that the properties belonged to the temple. The 2nd defendant the archaka stated as D.W. 1 that the patta for the lands comprised in schedule *B* stood in the name of the idol. In addition to this in the written statement filed by him in O.S. No. 114 of 1923 on the file of the Sub-Court, Bapatla, he referred to the fact that there were some proceedings before the Inam Commissioner and he complained that the recitals in it in favour of the temple could not be availed of as against him. Unfortunately neither the sanad nor the extract from the Inam Register has been filed in this case. Admittedly the properties are to be enjoyed by the archaka only so long as he does service. If he does not perform, in whom does the reversion vest? In the face of the admission of the 2nd defendant that the patta stands in the name of the idol and in the absence of any other evidence the lower Court ought to have found that the reversion at least vested in the temple and therefore the *B* schedule properties must be considered to be temple properties. It is unnecessary at this stage to speculate as to what interest the auction-purchaser who purchases the properties in a sale held in respect of the *B* schedule properties for the contribution payable by the temple to the Board would get. It is enough to find for the purpose of this appeal that they must be considered to be temple property.

H.R.E. Board, Madras v. Ramiah.

The contention of the trustee that it must be considered to be a special endowment on the ground that it was endowed for *nitya naivedya deeparadhana* cannot be upheld because all that has to be done in a temple is the offering of *naivedya* and *deeparadhana*. An endowment for such a purpose is a general endowment to the temple.

In these circumstances I find that the *B* schedule properties were also temple properties and that therefore they are liable to be proceeded against for the contribution.

In view of my finding that the endowment even for *nitya naivedya deeparadhana* is a general endowment and not a special endowment it has to be found that the plaintiff is not entitled to the injunction claimed.

In the result the appeal is allowed and the plaintiff's suit dismissed with costs of the 1st defendant Board only in all the three Courts. The Board's costs in all the three Courts will be paid by the temple as the trustee had to file the suit in view of the fact that he was not in possession of the *B* schedule properties as per the terms of the compromise entered into by his predecessor and which is also referred to in the Register maintained by the Board. The 2nd defendant will not be entitled to any costs in any of the Courts.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Ordinary Original Civil Jurisdiction.*]

PRESENT:—MR. JUSTICE BELL.

Rajkumar Visweswara Gajapathi Raj, minor represented by his mother Rani Pushpathi Vidyavati Devi, as his next friend and residing with her at Bangalore and another .. *Plaintiffs**

v.

Mirza Raja Sri Pushavati Viziaram Gajapathi Raj Manne Sultan Bahadur Garu, minor Rajah of Vizianagaram, represented by the Court of Wards, Chepauk, Triplicane, Madras and others .. *Respondents.*

Visweswara Gajapathi Raj *v.* Rajah of Vizianagaram.

Impartible Estate in Madras—Legatee of a debt payable by the impartible estate succeeding to the estate—Debt, not extinguished by merger.

The holder of an impartible estate in Madras, since the passing of the Impartible Estates Act, 1904, is in the same position as the manager of a joint Hindu family. He is an owner subject to limitations and not an absolute owner. Where a person succeeding to such an ancestral impartible estate is also the recipient of a legacy consisting of monies and outstandings due by that estate, there is no merger and the debt is not extinguished as he has a dual capacity.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *N. Rajagopala Aiyangar* and *M. Seshachalapathi* for Plaintiffs.

T. R. Venkatarama Sastri, S. Venkatesa Aiyangar and *V. K. Thiruvenkatachari* of Messrs. S. Parthasarathi and V. K. Thiruvenkatachari for Respondents.

The Court delivered the following

JUDGMENT.—In this case the question is whether, where a person succeeds to an ancestral impartible estate and also receives a legacy consisting of monies and, outstandings due by that estate, merger takes place and the legacy is extinguished. The facts may be stated shortly as follows: One Chitti Babu Vijiaram Raju, one time Raja of Vizianagaram, executed a trust-deed on October, 28th, 1912, whereby he vested property in trustees to hold for himself for life with remainder over to his elder son Alakh Narayana Gajapathi Raja, for him to hold it as an ancestral impartible estate descending according to the law of primogeniture. He had another son named Vijia Ananda Raja. On the 11th September, 1922, the father died and on the 2nd October, 1922, the son, Alakh Narayana Gajapathi Raja, entered upon the ancestral estate and the trust came to an end. An aunt of Chitti Babu Vijiaram Raju, the Maharani of Rewa, had made a will on the 14th December, 1911, whereby she gave a life estate in her property to Vijiaram Raju with the remainder over in favour of Alakh Narayan Gajapathi Raja and Vijia Ananda Raja, the former being entitled to two-thirds and the latter to one-third. She died on the 14th December, 1912, so that on the same day, upon the death of his father, Alakh Narayana Gajapathi Raja received two properties, (*a*) the ancestral estate and (*b*) the legacy. The legacy, the principal property left by the Maharani of Rewa was a sum of about 32 lakhs of rupees which was owed to her by the

*O.S. No. 24 of 1940. 30th June, 1942.

Visweswara Gajapathi Raj v. Rajah of Vizianagaram.

impartible estate of Vizianagaram. During the lifetime of Viziaram Raja he received the interest due upon these monies and on his death the new Raja received it too. There are accounts showing that payments were made to him and that all along he treated the debt as subsisting and as being owed by the estate of which he was the holder to himself as legatee under the Maharani of Rewa's will. After some years had passed, no doubt after receiving some advice, in order to make the position quite plain he gave a promissory note as Zamindar, that is as owner of the impartible estate, to himself as legatee under the will. That is Ex. P-13. Various other documents are exhibited showing entries which are consistent with this attitude. An administration report on the estate made to the Court of Wards, dated the 18th January, 1937, refers in terms to an "inside debt of 21 lakhs due to the present Raja under the Maharani's will". It is now contended, or it was contended and the present suit is the result, that as the Zamindar and the legatee were one and the same person, the debt was extinguished the moment the estate and the legacy passed into the same hands; that is to say, that a merger takes place.

Now in *Dulhin Lachhanbati Kumri* v. *Bodhnath Tiwari*,[1] it is said that,

> "Merger is not a thing which occurs *ipso jure* upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. There may be many reasons—conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others—in the course of which the expediency of avoiding the coalescence of interest and preserving the separation of title may be apparent. In short, the question to be settled in the application of the doctrine is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain?"

Had it been possible to apply the doctrine of merger here, I would have held that the separation had been made clear by the conduct of the Raja, by the entries in the books of account and by the terms of the report to the Court of Wards. But I think the merger could not in any event take place because I think the Raja had one status as Zamindar, that is as owner of the impartible estate, and another as recipient of the legacy. He was absolute owner of the legacy. He was not, in my opinion, absolute owner of the impartible estate. Whatever may be the case in other parts of India, in Madras, since the passing of the Impartible Estates Act of 1904, the holder of an impartible estate is in the same position as the manager of a joint Hindu family; he is an owner subject to limitations; he is a qualified and not an absolute owner. Therefore the Raja had a dual capacity. In one he owed money to the legatee, in the other he was the legatee to whom money was owed. There was therefore no merger, and the debt was not extinguished. The plaintiffs succeed in the claim and there will be a decree in the terms of the prayer. Costs of the suit will be paid by the first defendant out of the estate and there will be no order as to costs with regard to defendants 2 and 3. I certify for two counsel for the 1st plaintiff.

K.S. —————— *Suit decreed.*

1. (1921) L.R. 48 I.A. 485 at 491.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Pappammal .. *Appellant** (*Plaintiff*)

v.

Ramaswami Chettiar .. *Respondent* (*Defendant*).

Pappammal *v.* Ramaswami Chettiar.

Madras Agriculturists' Relief Act (IV of 1938), sections 7 and 10—Status of agriculturist—When to be possessed—Crucial dates for applicant to prove.

Reading sections 7 and 10 of Madras Act IV of 1938 together, in the absence of any provision requiring proof that the debtor must continue to be an agriculturist also up to the time when the matter comes before the Court, the debtor in cases where his claim to relief is put forward during the trial of the suit itself will be entitled to relief if he can show that he was an agriculturist on 1st October, 1937 and on the commencement of the Act 22nd March, 1938.

Devarayan Chettiar v. *Subramania Aiyar,* (1941) 2 M.L.J. 257, explained.

Appeal against the decree of the District Court of Trichinopoly in A.S. No. 243 of 1940 preferred against the decree of the Court of the District Munsiff of Ariyalur in O.S. No. 76 of 1939.

R. Viswanathan and *T. R. Srinivasan* for Appellant.

K. S. Desikan and *K. Raman* for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The appellant was the plaintiff in a suit for redemption of a pledged jewel and claimed to be entitled to the benefits of the Madras Agriculturists' Relief Act IV of 1938 by virtue of the possession of a leasehold interest in agricultural land. The trial Court came to the conclusion that she had not established the truth of the lease. The lower appellate Court, assuming but not deciding that the lease did exist for the period from 1st March, 1937 to 22nd March, 1938, held that at the date of the suit the appellant had no interest in agricultural lands sufficient to satisfy the definition of an agriculturist and that she was therefore not entitled to relief. The suit was filed in 1939.

It is contended in second appeal that the question whether the appellant was or was not an agriculturist at the time of the suit is immaterial having regard to the wording of section 7 which prescribes that all debts payable by an agriculturist at the commencement of the Act shall be scaled down in accordance with the provisions of Chapter II. In *Palani Goundan* v. *Peria Goundan,*[1] a case under section 19 of the Act, we had occasion to consider what were the crucial dates with reference to which the applicant had to prove his agriculturist status and we held that having regard to section 10 of the Act he must be an agriculturist on 1st October, 1937, having regard to section 7 of the Act he must be an agriculturist on 22nd March, 1938, and having regard to the terms of section 19 in cases falling under that section

*S.A. No. 600 of 1941. 27th July, 1942.

1. (1940) 2 M.L.J. 887.

Pappammal v. Ramaswami Chettiar.

Wadsworth, J.

he must be an agriculturist at the time of the application. Section 19, however, has no reference to cases in which relief under the Act is sought in the trial of the suit itself. The respondent has quoted our decision in *Devarayan Chettiar* v. *Subramania Aiyar*[1] as suggesting that the debtor must also be an agriculturist on the date of the suit. The headnote to the report of this decision contains the words:

> "The relevant period apart from the date of the suit when a debtor has to be an agriculturist * * *"

This phrase in the headnote is somewhat misleading. It seems to be based on a passage at the end of the judgment which says:

> "Applying this criterion to the present facts, the first defendant has been proved to have been an agriculturist at the time of the suit and also to have had the necessary qualifications ever since May, 1937";

that is to say, we pointed out that he was an agriculturist both before the crucial date 1st October, 1937, and after the crucial date 22nd March, 1938, which is the date of the commencement of the Act. We had no occasion on the facts of that case to consider whether it was necessary that he should have been an agriculturist on the date of the suit and the case is not authority for the proposition in support of which it has been quoted.

It seems to us that apart from section 19 and section 23 where the Act expressly requires that the debtor should be an agriculturist at the time of the application and section 13 dealing with debts incurred after the Act where the date of the debt is made the important date, there is nothing in the Act which requires the debtor to prove his agriculturist status as on the date on which the matter is brought to the notice of the Court. Section 7 contemplates the application of the provisions of the Act to all debts payable by an agriculturist at the commencement of the Act but this is subject to the qualification in section 10 that the provisions of sections 8 and 9 shall not apply to a person who was not an agriculturist on 1st October, 1937. Reading these two sections together, in the absence of any provision requiring proof that the debtor must continue to be an agriculturist also up to the time when the matter comes before the Court, we are of opinion that the debtor in cases where his claim to relief is put forward during the trial of the suit, will be entitled to relief if he can show that he was an agriculturist on 1st October, 1937 and on the commencement of the Act, 22nd March, 1938.

In the result therefore we allow the appeal and set aside the order of the lower appellate Court and remand the case to the lower appellate Court for fresh disposal in the light of this judgment after recording findings on the status of the appellant as on 1st October, 1937 and 22nd March, 1938. Costs to abide the result. The appellant will be entitled to a refund of the court-fees in second appeal.

K.C. ——— *Appeal allowed.*

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1. (1941) 2 M.L.J. 257.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL.

Nanjunda Reddy (died) and others .. *Appellants**
(Plff. and nil)

v.

Venkatappa, minor, represented by Mr. V. S. Rangaswami Aiyangar and another .. *Respondents*
(Defendants).

Nanjunda Reddy *v.* Venkatappa.

Hindu Law—Debts—Antecedent debt—Sale taken by father—Mortgage executed for payment of price—Transactions inter-related—Mortgage whether an antecedent debt—Remedy against son.

The father of the 1st defendant executed the suit mortgage on 18th March, 1927, and the money was advanced to enable the mortgagor to pay the balance due in respect of a sale-deed in his favour, dated 9th February, 1927, and registered on 6th April, 1927. The evidence showed that the sale and mortgage-deeds were part of the same transaction. In a suit filed by the mortgagee, the mortgagor's son pleaded that the money borrowed under the mortgage was not for discharging an antecedent debt and was not binding on him.

Held, that the fact that the mortgage-deed was executed between the dates of the execution of the sale-deed and the registration of it together with the payment of the balance under the sale-deed which was the consideration for the mortgage indicated that the transactions were connected, that the mortgage could not be said to have been executed for an antecedent debt, and that the mortgagee could only proceed against the father's share in the mortgaged property.

Held, further, that the son was entitled to resist the mortgage suit notwithstanding the fact that he was in enjoyment of the property purchased by his father with the mortgage money.

Appeal against the decree of the Court of the Subordinate Judge of Salem in Appeal No. 33 of 1939 (A.S. No. 269 of 1938 District Court, Salem) preferred against the decree of the Court of the District Munsiff of Krishnagiri in O.S. No. 353 of 1937.

K. Narasimha Aiyangar and *T. Thyagaraja Aiyar* for Appellants.

V. S. Rangaswami Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The suit out of which this appeal arises was brought by the appellant as plaintiff to enforce a mortgage executed in his favour by the deceased father of the 1st defendant and the brother of the 2nd defendant as manager of a joint family. The mortgage-deed, Ex. A, was executed on the 18th March, 1927. The money advanced under the security of the mortgage was Rs. 1,000 and it was advanced to enable the mortgagor to pay the balance of Rs. 1,000 due in respect of a sale-deed, Ex. B, dated 9th February, 1927, which was registered on 6th April, 1927. Both the lower Courts held that the mortgage-deed was not executed for necessity, and this means that the mortgage is not binding on the half share of the 2nd defendant. Since this finding has not been challenged in appeal, the mortgage will not be binding on the share of the 1st defendant also unless it is proved that the debt to pay which the mortgage

*S.A. No. 649 of 1940. 27th February, 1942.

Nanjunda Reddy *v.* Venkatappa.

money was advanced was an antecedent debt. The question of antecedence was not raised in the plaint but was argued at the trial of the suit and evidence was adduced in support of the contention that the debt incurred in respect of the sale-deed was antecedent to the mortgage-debt. Both the lower Courts, however, held that the sale under Ex. B and the mortgage transaction evidenced by Ex. A were not independent transactions but were part of the same transaction. The learned District Munsiff also held that there was no consideration for the mortgage and dismissed the suit. But the learned Subordinate Judge, holding that there was consideration, allowed the appeal in part and gave a preliminary decree for sale against the one-fourth share in the mortgaged property of the 1st defendant's father for the realisation of Rs. 1,000 with costs and interest.

The first contention of the appellant is that the lower Court should have held that the money was borrowed on the mortgage to discharge an antecedent debt and that the decree should consequently have been given against the half share in the mortgaged property of the mortgagor and the 1st defendant, his son. The facts regarding the connection between the purchase of the property under the sale-deed Ex. B, by the respondent's father and the advance of the money under the mortgage Ex. A executed on 18th March, 1927, are, as stated already, that the sale-deed was executed on 9th February, 1927, on which date a sum of Rs. 1,000 was paid towards the purchase money while Rs. 1,000 remained to be paid; that the mortgage was executed on 18th March, 1927, with the recital that the money was advanced for the purchase of lands; that the money under the mortgage was paid although it is not found when; and that finally on 6th April, 1927, Rs. 1,000 was paid towards the sale-deed Ex. B which was registered on that date. The learned District Munsiff did not discuss the question of the antecedence of this debt covered by the sale-deed but observed simply that an antecedent debt means antecedent in fact as well as in time, *i.e.*, it must be truly independent of and not part of the transaction impeached. The learned Subordinate Judge also pointed out that "a debt that is claimed to be antecedent for the purpose of making a son liable must be antecedent not merely in point of time, but also in substance," and he found that the debt incurred in the purchase of lands was not an antecedent debt because the purchase of the lands under Ex. B was not concluded until the registration of the deed on 6th April, 1927, *i.e.*, after the execution of the mortgage-deed. It is argued by learned counsel for the appellant that the learned Subordinate Judge should have held that the debt came into existence on 9th February, 1927, and that as it was prior to the execution of the mortgage-deed, it should have been found to be an antecedent debt. It is also argued that it is not the case that the liability on the part of the mortgagor to pay the balance of the consideration under the sale-deed came into existence only on 6th April, 1927, since the evidence is that he was put into possession of the land purchased by him as soon as the sale-deed was executed, on 9th February, 1927.

Nanjunda Reddy v. Venkatappa.

The mortgagor may have been liable to pay the balance of Rs. 1,000, in the circumstances of the case, even before the registration of the deed. But it does not follow necessarily, even then, that the execution of the sale-deed and the mortgage-deed were separate transactions and distinct in time and substance. In support of his contention, learned counsel has referred me to a decision of Horwill, J., reported in *Mariyappa* v. *Ramanuja*[1] and he contends that this decision should be followed in preference to cases cited on the other side, *viz., Ramkaran Thakur* v. *Baldeo Thakur*[2] and *Chitradhar Narain Das* v. *Khidar Thakur.*[3] *Mariyappa* v. *Ramanuja*[1] was a case in which *A* mortgaged certain items of property which he had purchased, and also other items to *B* in order to find the purchase money for the items of property which he had bought. The mortgage was later in date than the sale. Horwill, J., found that the sale and the mortgage were distinct transactions and that the purchase money constituted an antecedent debt in relation to the money advanced under the mortgage-deed. No doubt there is some similarity between the facts of this case and the facts of the case now in question; but it was pointed out in *Ramkaran Thakur* v. *Baldeo Thakur,*[2] that the question whether a debt is antecedent or not is primarily a question of fact, and Horwill, J., in the case decided by him observes:

> "These two acts can however amount to one transaction only if the parties to the mortgage and the sale looked upon them as one transaction; but there seems to be no evidence in this case that the vendor had anything to do with the mortgage or, more important still, that the plaintiff had anything to do with the sale."

In the present case, the fact that the mortgage-deed was executed between the dates of the execution of the sale-deed and the registration of it together with the payment of the balance under the sale-deed, which was the consideration for the mortgage, indicates very strongly that the two transactions were closely connected. The learned Subordinate Judge has held on a consideration of the facts and circumstances that the debt was not an antecedent debt, and, in the circumstances of the case, especially in the absence of the evidence which has not been printed, it does not seem to me to be possible to say that that this finding is wrong. It does not follow, because it has been held on the facts in *Mariyappa* v. *Ramanuja*[1] and on the facts in another decision of a Bench of this Court to which I have been referred—*Damodaram Chetty* v. *Bansilal Abeerchand*[4]—that the debts were antecedent debts, that therefore on the facts of this case it must be held that the debt in respect of the sale-deed was a debt antecedent to the mortgage debt. On the facts the finding of the learned Subordinate Judge was justified and was not wrong in principle or on authority.

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1. A.I.R. 1938 Mad. 465.
2. (1938) I.L.R. 17 Pat. 168: A.I.R. 1938 Pat. 44.
3. (1937) I.L.R. 17 Pat. 236: A.I.R. 1938 Pat. 437.
4. (1926) 55 M.L.J. 471: I.L.R. 51 Mad. 711.

Nanjunda Reddy *v.* Venkatappa.

It is next argued for the appellant that even if the decree must only be against the one-fourth share of the father in the mortgaged property, it should be amended to be not merely against his one-fourth share but against his "right, title and interest" in the mortgaged property at the time of the mortgage. The object of this contention is said to be to enable the appellant in execution of the decree to obtain, if the facts and circumstances justify it, not only his one-fourth share in partition of the mortgaged property, but the father's interest in the mortgaged property. It is plain that until the father's share in the mortgaged property has been sold no question of the appellant's right to any other part either of the mortgaged property or any other property of the family can arise. He can only proceed, whether by sale or by an application for partition or both, against the share of the father in the other properties of the family, if any, if and when he has failed to realise the amount due under the mortgage by the sale of the mortgaged property subject to sale.

It is finally argued that the respondent-1st defendant should not have been heard to say that the mortgage was not binding on his share of the mortgaged property in view of the fact that he was in enjoyment of the property purchased with the mortgage money. There is, in my opinion, no substance in this contention and the case to which I have been referred to in support of it *Sohan Lal* v. *Atal Nath*[1] relates to an entirely different kind of suit. That was a case in which a minor was sued for the recovery of money borrowed by his guardian with which the guardian had purchased property which the minor was enjoying on the date of suit. It was held in effect that the minor could not refuse to return either the money or the property. That, of course, is an entirely different case from the present which was brought to enforce a mortgage. Whether the appellant had other remedies open to him need not be considered here. It is clear that the 1st defendant was entitled to resist the suit on the mortgage on the ground that the mortgage was not binding on him since it was not for necessity or executed to pay an antecedent debt. It is clear also that the appellant in a suit to enforce the mortgage cannot, as learned counsel contends on his behalf, be given a charge on the property purchased with the mortgage money to the extent of the 1st defendant's share in the family property.

The decree of the lower appellate Court is, therefore, confirmed and the appeal is dismissed, but without costs as the minors are represented by a Court guardian whose fees have already been paid by the appellant.

B. V. V. —— *Appeal dismissed.*

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1. (1933) I.L.R. 56 All. 142.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE HAPPELL.

Angadi Masumayya .. *Appellant** (*Petr.*)

v.

The Official Receiver, Kurnool .. *Respondent* (*Respt.*).

Masumayya v. Official Receiver, Kurnool.

Insolvency—Insolvent holder of certain service inam lands—Whether Official Receiver can claim to let lands—Nature of holding involving personal service—Non-transferable.

Where an insolvent was the holder of lands which were described as Masjid service inam lands, on the question whether the Official Receiver in insolvency could claim the right to let the lands as vested in him,

Held, that such lands not only could not be alienated, but could not be transferred from the holder to an official such as the Official Receiver.

Anjaneyalu v. *Sri Venugopala Rice Mills, Ltd.*, (1922) 42 M.L.J. 477: I.L.R. 45 Mad. 620, applied.

Bhola Nath v. *Chunni Lal*, A.I.R. 1932 All. 41, referred to.

Appeal against the order of the District Court of Kurnool, dated 9th April, 1940 and made in M.P. No. 186 of 1940 in I.P. No. 44 of 1931.

S. Venkatesa Aiyangar for Appellant.

Respondent not represented.

The Judgment of the Court was delivered by

Mockett, J.

Mockett, J.—The appellant is the insolvent in I.P. No. 44 of 1931 in the Court of the District Judge of Kurnool. He holds what are described as the Masjid service inam lands granted for doing service in Gaffar Sab' Mosque in Gaduthamadugu. He alleges in his petition, the subject-matter of this appeal, that he is doing the service and that he has a right to enjoy the lands. The Official Receiver had claimed that the right to let the lands is vested in him. The petitioner contends that he was entitled to delivery of possession of the lands concerned which "by mistake" had been delivered to the Official Receiver. According to the Official Receiver since 1931 he had been in possession in the sense that he had been letting out these lands to Mohammadan cultivators and he states that there is no complaint that the service was not rendered in the mosque till now. The learned Judge refused the application of the appellant and the possession of the lands remained with the Official Receiver.

The insolvent appeals against that order. He has been represented before us by counsel, but the Official Receiver has not appeared. The argument as put by the learned counsel for the appellant is as follows. He says that these lands are inalienable being service inam lands. We observe that that was conceded by the Official Receiver in the Court below and we think that the decision of a Full Bench of this High Court reported in *Anjaneyalu* v. *Sri Venugopala Rice Mills, Ltd.*,[1] makes that position sure. The Chief Justice in giving judgment (page 623) considered that section 6, sub-clause (*d*) of the Transfer of Property Act made these lands inalienable because it was opposed to the

*A.A.O. No. 68 of 1941. 7th August, 1942.

1. (1922) 42 M.L.J. 477: I.L.R. 45 Mad. 620.

nature of the interest affected thereby. The learned Chief Justice gives cogent reasons why the transfer of an inam such as this is contrary to the interest of all concerned. But the question remains as to what happens in an insolvency. Does the Official Receiver stand in the shoes of the insolvent as ordinarily happens? Section 28 (5) of the Provincial Insolvency Act says:

"The property of the insolvent for the purpose of this section shall not include any property (not being books of account) which is exempted by the Code of Civil Procedure, 1908, or by any other enactment for the time being in force from liability to attachment and sale in execution of a decree."

As we have already pointed out the Full Bench held that such lands as these cannot be transferred and could not therefore be attached. Learned counsel for the appellant in this case has been in a position to direct our attention to a decision of the Allahabad High Court which almost covers the position before us. In *Bhola Nath* v. *Chunni Lal*,[1] Sulaiman, A.C.J. and Bajpai, J., had a case before them concerning the ex-proprietary holdings under the Agra Tenancy Act. On the question whether they could vest in the Official Receiver, it appears to be quite clear from the judgment, though we have not the advantage of examining the Act, that the ex-proprietary holdings are not saleable that is to say they are not alienable. Sulaiman, A.C.J., discussing the topic proceeds:

"As the exproprietary holdings do not vest in the receiver, it is quite clear that he has no right to obtain possession of those holdings so as to be able to cultivate the lands or sublet them to any sub-tenants he pleases. It is in this sense that the District Judge has held that no receiver of the ex-proprietary holdings can be appointed. This view is obviously right.

It is also quite clear that, as the Insolvency Court cannot deal with these ex-proprietary holdings, the receiver cannot assign the rents in advance which may in future become payable by the sub-tenants to the ex-proprietary tenant; nor can the Court direct an attachment or seizure of such rents which will fall due in future."

The learned Judges also in 45 Madras have indicated their view that if the lands are alienated the interest of the holder and of those for whom he should perform the service will be prejudiced. It seems to follow from this that if the lands are to go out of the control of the holder and pass into the control of an official such as the Official Receiver—in this case it must be remembered that the Official Receiver is a Hindu while the insolvent is a Mohammadan—the performance of the services must obviously be in peril. The whole trend of authority is that these lands not only cannot be alienated, but cannot be transferred from the holder to an official such as the Official Receiver.

Accordingly the appeal must be allowed. We make no order as to costs as the appellant has shown no interest whatever in the earlier proceedings in insolvency.

K.C. ——— *Appeal allowed.*

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1. A.I.R. 1932 All. 41.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Kona Hasan Fathima Bivi (deceased) and others .. *Petitioners** (*Petrs.* 2 *to* 10)

v.

Muhammad Muhaideen Nachiar and others. .. *Respondents* (*Respts.*).

Kona Hasan Fathima Bivi *v.* Muhammad Muhaideen Nachiar.

Madras Agriculturists' Relief Act (IV of 1938), sections 3 (ii), 8, 9 and 19—Father's decree debt—Claim by heirs for relief under the Act whether justifiable—Whether decree debt scalable under section 8.

A promissory note had been executed by a person who was not an "agriculturist" within Madras Act IV of 1938, on 6th April, 1920. A decree thereon had been obtained on 1st November, 1930. The judgment-debtor died on 27th September, 1935. On an application after the Act came into force, by the heirs of the debtor brought on record as his legal representatives in the execution proceedings, to have the decree debt scaled down on the ground that they were "agriculturists",

Held, that the petitioners were entitled to claim relief under the Act as "agriculturists" although their father whose liability they had inherited was himself not an agriculturist.

Perianna v. *Sellappa,* (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218, followed.

Held, further, that it was immaterial whether or not the debtor had the agriculturist character when the debt was actually incurred where it was incurred prior to 1st October, 1937. The petitioners' succession to their father's estate would not be the basis of any new liability. The material dates with reference to which the agriculturist character has to be determined for the purpose of awarding relief under section 19 are the 1st October, 1937, 22nd March, 1938 (the date of the commencement of the Act) and the date of the application. Accordingly the decree sought to be executed should be amended by scaling down the amount payable thereunder in accordance with section 8.

Palani Goundan v. *Peria Goundan,* (1940) 2 M.L.J. 887, applied.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of East Tanjore at Negapatam, dated 7th September, 1940 and made in I.A. No. 25 of 1940 in O.S. No. 43 of 1929 on the file of the Court of the Subordinate Judge of Negapatam.

S. K. Ahmed Meeran for Petitioners.

K. S. Champakesa Aiyangar and *Basheer Ahmed Sayeed* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—This civil revision petition arises out of an application made by the petitioners to the Court of the District Judge of East Tanjore for scaling down a decree debt under the Madras Agriculturists' Relief Act (hereinafter referred to as the Act).

The respondents sued to recover the amount due under a promissory note executed by the petitioners' father on 6th April, 1920, and obtained a decree on 1st November, 1930. The petitioners' father who was the 1st defendant in the suit died on 27th September, 1936, and the petitioners, who were his heirs under the Mohammadan Law, were brought on record in the execution proceedings as his legal representatives. After the Act came into force in March, 1938, the petitioners claiming to be agri-

*C.R.P. No. 136 of 1941. 21st July, 1942.

Kona Hasan Fathima Bivi v. Muhammad Muhaideen Nachiar.

Patanjali Sastri, J.

culturists as defined in the Act applied to have the decree debt scaled down in accordance with the provisions thereof. The application was resisted on the ground *inter alia* that the petitioners' father who was the original debtor was not an agriculturist within the meaning of the Act, and that as the debt could not have been scaled down if he were alive and had applied for relief, the petitioners who merely represented his estate and were liable to pay the debt out of its assets in their hands were in no better position and could claim no relief under the Act though they were themselves agriculturists. This contention of the respondents found favour with the learned District Judge who accordingly dismissed the application for scaling down the decree.

It is not disputed that the petitioners' father had before he died in September, 1936, been assessed to property or house tax in respect of buildings and lands other than agricultural lands under the Madras District Municipalities Act, 1920, within two years immediately preceding the 1st October, 1937 and was therefore disqualified to be an agriculturist by reason of proviso C to section 3 (*ii*) of the Act. But the learned counsel for the petitioners contended before us that the view taken by the learned District Judge is erroneous in view of the decision of this Court in *Perianna* v. *Sellappa*.[1] In that case a Bench of this Court (Varadachariar and Abdur Rahman, JJ.) held that the right to claim relief under the Act was not confined to the person who actually contracted the debt but was available equally to persons who were liable on account of the possession of property and that accordingly the liability of a purchaser of the equity of redemption in a portion of mortgaged property was a debt liable to be scaled down under the provisions of the Act. Referring to the contention that while clause (*v*) of section 3 which defines "creditor" takes care to include heirs, legal representatives and assigns, there is no corresponding definition in the case of a "debtor" and that therefore relief under the Act should be limited to cases where a person is personally liable, the learned Judges observed:

> "This omission is obviously due to the fact that the reference to liability in clause (*iii*) is wide enough to cover every person who is in any manner liable, either because he is personally liable or because be is liable on account of the possession of property. There was no necessity to refer to any heir, legal representative or assign except in cases in which such person was (not?) liable within the meaning of clause (*iii*)."

It is clear that the learned Judges assumed as beyond question that the liability of an heir or legal representative falls within the purview of the Act provided, of course, such person was an agriculturist, and we have extended the principle of the decision to various cases where the liability of a person arises by reason of his possession of property. As pointed out by the learned Judges the "avowed purpose (of the Act) was to enable agriculturists to retain their property and prevent such property passing into the hands of creditors or execution purchasers" and it would largely defeat such purpose, if the benefit of the Act were to be denied to the large class of persons who come under liability by

1. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.

Kona Hasan Fathima Bivi *v.* Muhammad Muhaideen Nachiar.

Patanjali Sastri, J.

devolution and who are themselves agriculturists as defined by the Act. We are therefore of opinion that the petitioners are entitled to claim relief under the Act as agriculturists although their father whose liability they have inherited was himself not an agriculturist.

The question next arises as to whether the decree debt has to be scaled down under section 8 as a debt incurred before the 1st October, 1932, or under section 9 as a debt incurred after that date. Where a decree has been passed for the re-payment of a debt, we have held that the material date for this purpose is the date on which the debt was originally incurred and not the date of the decree. *Ramaseshayya* v. *Kutumba Rao*.[1] It will be seen that the debt here in question was originally incurred by the petitioners' father when he executed the promissory note on 6th April, 1920, but the petitioners came under liability as his heirs when he died in September, 1936. It was urged for the respondents that the liability of the petitioners to satisfy the decree out of the assets of their father which have come to their hands could be scaled down if at all only under section 9 of the Act as such liability arose only on the death of their father and not before, while the petitioners contended that no fresh liability was incurred when their father's liability under the note of 1920 devolved upon them and that it fell under section 8. Here again the decision in *Perianna's case*[2] seems to lay down the governing principle. The debt in that case was originally incurred by the mortgagor in 1929 but the applicant for relief under the Act purchased part of the hypothecated property and thus came under liability to pay off the mortgage in 1933. Repelling the contention that the appellant's liability should in such circumstances be taken to have been incurred only in 1933 the learned Judges observed:

> "This proceeds upon a misapprehension of the nature of the petitioner's liability. His liability is traceable to the original mortgage and his purchase was not the basis of any new liability. The liability that is now sought to be enforced is the liability arising out of the mortgage of 1929. The case therefore falls under section 8."

On the same reasoning it must be held that the liability now sought to be scaled down is the liability incurred under the promissory note of 1920 and the petitioners' succession to their father's estate cannot be the basis of any new liability. It was suggested that this view was somewhat inconsistent with our conclusion that the petitioners' right to obtain relief under the Act must be determined with reference to their agriculturist status; for, if the personal qualification of the heir is to be the basis for awarding relief, the date when he comes under the liability by succeeding to the property of his ancestor must be taken as the determining date for the purpose of scaling down the debt, as such liability viewed as his liability did not exist before, while, on the other hand, if the true theory of the liability of an heir or legal representative is that he continues or represents the *persona* of the deceased ancestor (see *Kanchamalai Pathar* v. *Shahaji Rajah*

1. (1940) 2 M.L.J. 235: I.L.R. (1940) Mad. 943.
2. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.

Kona Hasan Fathima Bivi *v.* Muhammad Muhaideen Nachiar.

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Sahib[1]) the agriculturist or non-agriculturist status of the ancestor alone should determine the right to relief. Whatever might be the force of this criticism from a strictly logical point of view, we cannot disregard the decision in *Perianna's case*[2] the principle of which we have applied and extended to various cases. The respondents' learned counsel sought to distinguish that case by pointing out that the original debtor there, *i.e.*, the mortgagor was also an agriculturist. This circumstance is no doubt referred to in the course of the judgment of the learned Judges, but it is difficult to see what difference it can make to the reasoning employed or to the conclusion reached, and we must take it that it was mentioned merely by way of narrowing down the controversy. In fact we have held in *Palani Goundan* v. *Peria Goundan*,[3] that it is immaterial whether or not the debtor had the agriculturist character when the debt was actually incurred where it was incurred prior to 1st October, 1937, and that the material dates with reference to which such character has to be determined for the purpose of awarding relief under section 19 are the 1st of October, 1937, 22nd March, 1938 (the date of the commencement of the Act,) and the date of the application. We see therefore no force in the distinction sought to be drawn between that case and the present.

In the result, the civil revision petition succeeds and the decree sought to be executed against the petitioners will be amended by scaling down the amount payable thereunder in accordance with section 8. It is not disputed that on this footing the amount payable to the respondent is Rs. 3,398-12-0 with interest at six per cent. per annum from 1st October, 1937, till realisation and execution costs. The petitioners will have their costs here and in the Court below.

K. C. —— *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Ordinary Original Civil Jurisdiction.*]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHASWAMI AYYANGAR.

F.B.

Krishnamurthi Aiyar, *In re.*

In re S. Krishnamurthi Aiyar .. *Petitioner**

Indian Press (Emergency Powers) Act (XXIII of 1931), *Section* 23—*Application to High Court for setting aside order of forfeiture under section* 19—*Limitation for making—Starting point.*

The period of two months, within which a person, having an interest in property in respect of which an order of forfeiture has been made under the Indian Press (Emergency Powers) Act, section 19, may apply to the High Court under section 23 to set it aside runs from the date of the notification of the order in the Fort St. George Gazette and not from the date of the order itself, because there can be no forfeiture until the declaration has been notified.

In the matter of the Indian Press (Emergency Powers) Act XXIII of 1931 and in the Matter of "Vira Savarkar".

1. (1935) 70 M.L.J. 162: I.L.R. 59 Mad. 461 at 477 (F.B.).
2. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.
3. (1940) 2 M.L.J. 887.

*O.P. No. 51 of 1941. 4th April, 1941.

F.B.

Krishna murthi Aiyar, *In re.*

Leach, C.J.

The Crown Prosecutor (*P. Govinda Menon*) for the Crown.

T. R. Venkatarama Sastri for *R. Chakravarti* for Petitioner.

The Court delivered the following judgments:

The Chief Justice.—The petitioner is the author of a book written in Tamil and entitled "Vira Savarkar" which has been translated as "Savarkar the Hero". It purports to be a biography of Mr. V. D. Savarkar, who has been the President of the Hindu Mahasabha since 1937. On 26th November, 1940, the Provincial Government declared the book to be forfeited to His Majesty under section 19 of the Indian Press (Emergency Powers) Act, 1931, read with section 4 (1) (*a*). The petitioner has applied to this Court under section 23 for an order setting aside the declaration of forfeiture. The learned Crown Prosecutor has raised the preliminary objection that the application is out of time, and therefore it is necessary to decide this question before dealing with the merits of the application.

Section 23 states that a person having an interest in property in respect of which an order of forfeiture has been made may within two months from the date of the order apply to the High Court to set it aside. The order of forfeiture in this case was not published in the Fort St. George Gazette until 3rd December, 1940. The petition was filed on 3rd February, 1941. If time is to run from the date on which the order was passed the application is out of time, but if the period of limitation runs from the date of the notification of the order the application is in time. The learned Crown Prosecutor says that as the words of section 23 are "within two months from the date of such order" the Court is bound to hold the petition to be out of time. To accept this contention might lead to an absurd situation. If the Government omitted to notify the order until two months had elapsed, the aggrieved person would have no remedy at all. It is the duty of the Court to interpret a statute according to the ordinary meaning of the words used, unless this would lead to a manifest absurdity and this would be the case here if the word "order" were taken to refer to the document which was signed on 26th November, 1940. In my judgment the word "order" contemplates the notified order. Section 19 says that where a book appears to the Provincial Government to contain any words, signs or visible representations of the nature described in section 4, sub-section (1) the Provincial Government may, by notification in the Official Gazette, stating the grounds of its opinion, declare every copy of the book to be forfeited to His Majesty. The word "order" in section 23 must be read as being the notified order because there can be no forfeiture until the declaration has been notified. For these reasons I hold that the petition has been filed in time.

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Mockett, J.

Mockett, J.—I entirely agree.

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Krishnaswami Ayyangar, J.

Krishnaswami Ayyangar. I agree.

K. S. *Petition held to be in time.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Syed Muhammad Ghouse Sahib Suthari .. *Petitioner**
(*3rd Counter-Petitioner*).

v.

Syed Muhammad Ghouse Sahib trustee and Manager of the Sha Rahmatullah Mosque at Shamayapuram .. *Respondent*
(*Petitioner*).

Syed Muhammad Ghouse Sahib Suthari *v.* Syed Muhammad Ghouse Sahib.

Madras Estates Land Act (I of 1908), section 3 (5)—Nature of proceedings thereunder—Collector exercising functions under the section, not a Court subordinate to High Court—No revision lies from Collector's order—Section 115, Civil Procedure Code.

Proceedings under section 3 (5) of the Madras Estates Land Act are purely of an executive or administrative character and the Deputy Collector acting under that section is not a Court subordinate to the High Court within the meaning of section 115 of the Code of Civil Procedure. No revision therefore lies from an order passed under section 3 (5) of the Estates Land Act.

Petition under sections 115 and 151, Civil Procedure Code, praying that the High Court will be pleased to revise the order of the Court of the Deputy Collector of Musiri Division, dated 26th February, 1941, and made in M.P. No. 46 of 1940.

A. Ramaswami Aiyar for Petitioner.

K. S. Sankara Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner seeks to revise under section 115 of the Code of Civil Procedure an order by the Deputy Collector of the Musiri Division under section 3 (5) of the Madras Estates Land Act. The respondent has a preliminary objection that revision does not lie because the Deputy Collector exercising his functions under section 3 (5) of the Madras Estates Land Act is not a Court subordinate to the High Court. It is pointed out that the duty of the Deputy Collector is only to recognise or nominate one or other of the disputants as the landholder, an expression defined in the first half of the sub-section. Such recognition or nomination is only provisional and could be contested in the ordinary civil Courts. In fact, section 3 (5) expressly states that the Deputy Collector's order is subject to any decree or order of a competent civil Court. The section makes no provision for any judicial enquiry and the use of the words "recognise or nominate" indicates that the proceedings are purely of an executive or administrative character, involving nothing more than the insertion in the revenue registers of the name of a person to whom the Collector looks for the payment of revenue and whom he recognises, subject to the civil Court's proceedings, as the person entitled to collect the rents.

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*C.R.P. No. 579 of 1941. 7th July, 1942.

Syed Muhammad Ghouse Sahib Suthari *v.* Syed Muhammad Ghouse Sahib.

I find that the Deputy Collector acting under section 3 (5) of the Madras Estates Land Act is not a Court subordinate to the High Court within the meaning of section 115 of the Code of Civil Procedure. The petition is accordingly dismissed with costs.

K. C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

The Sub-Collector, Rajahmundry .. *Appellant** (*Respondent*)

v.

Pillarisetti Parthasarathi Naidu and another .. *Respondent* (*Claimants*).

Sub-Collector, Rajahmundry *v.* Parthasarathi Naidu.

Land Acquisition—Compensation—Basis of fixing market-value.

The function of the Court in awarding compensation for land compulsorily acquired is to ascertain the market-value of the land at the date of the notification under section 4 (1) of the Land Acquisition Act. The number of years' purchase which should be adopted as the basis for fixing the market-value in a given case must vary with individual cases and will have to be decided upon the material placed before the Court. Where definite material is not forthcoming either in the shape of sales of neighbouring land at or about the date of the notification or otherwise, the Court can only proceed to do the best, it can under the circumstances and fix the market value by capitalising the net annual income at twenty years' purchase.

Land Acquisition Officer, Calicut v. *Subba Rao*, (1941) 2 M.L.J. 75, considered.

Appeal against the award of the District Court of East Godavari at Rajahmundry, dated 25th March, 1940, and made in O.P. No. 56 of 1935.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

K. Umamaheswaram for Respondents.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.

Krishnaswami Ayyangar, J.—This appeal arises out of certain land acquisition proceedings taken for the purpose of acquiring 648 sq. ft. in Town Survey No. 1625|1-A in Ward No. 4, Block 39 in the Town of Rajahmundry. The land acquisition officer awarded compensation at the rate of Rs. 4-8-0 per square yard. On a reference under section 18 of the Act, the District Judge of East Godavari enhanced the compensation by awarding Rs. 26 per square yard. The Government has preferred this appeal and objects to the award of the District Judge on the ground that it is too high.

It is contended by the Government Pleader that the learned Judge was in error in proceeding to fix the market value with reference to the rent which was received from the property acquired. He has argued that Ex. II which is a sale-deed of neighbouring property furnishes the true basis for the award of

*Appeal No. 388 of 1940. 26th June, 1942.

Sub-Collector, Rajahmundry v. Parthasarathi Naidu.

Krishnaswami Ayyangar, J.

compensation. Ex. II is dated 23rd July, 1928, and is a sale of 1000 square yards at Rs. 3 a square yard. In view of the fact that the notification under section 4 (1) in the present case was issued on 11th December, 1934, and the sale-deed Ex. II was more than six years prior in date, we are of opinion that this document does not furnish proper material for fixing the market value. Moreover, there is the evidence of the second witness for the claimant who has deposed that the value of the sites in the locality has increased by reason of the springing up of fresh amenities not in existence before. He has stated that a large number of houses has sprung up near the site acquired and two cinema halls have also come into existence in the locality and a petrol bunk opposite to it. The learned Government Pleader has suggested that the evidence does not make it clear that these amenities came into existence before the notification under section 4 (1). The learned Judge in the Court below is apparently of the opinion that they did. If it was the case of the Government that they came into existence after the notification the matter must have been cleared by cross-examination directed to the purpose. But no such thing has been done. We are prepared to hold with the District Judge that the springing up of fresh amenities in the neighbourhood has pushed up the value of the suit site and its neighbourhood. Apart from Ex. II, there is no other sale-deed of neighbouring land which has been put forward as furnishing data for arriving at the market value. One other sale-deed, Ex. III, dated 24th July, 1928, was filed but admittedly the property covered by it is situated about half a mile away from the suit site and cannot furnish a proper criterion of the value.

The only material placed before the learned Judge in the Court below thus consisted of rental agreements of the acquired site. These are Ex. D series. Ex. D-2 the earliest of them is dated 22nd August, 1931, and was for a period of one year at Rs. 10 per month. On 1st August, 1932, another rental agreement, Ex. D-1, came into existence covering a period of two years and the rent fixed was Rs. 13. Ex. D was the rental agreement in force at the time of the notification and is dated, 1st October, 1934, and the rent fixed under it was also Rs. 13 per month. The learned Judge was right in his conclusion that Rs. 13 per month should be taken to be the gross rental received from the property. But before capitalising the rental income he should have deducted the municipal taxes payable in respect of the property and Ex. C series show that the half-yearly tax was Rs. 10-13-3. Out of a gross annual rent of Rs. 156, Rs. 21-10-6 must therefore be deducted in order to arrive at the net rental annual value.

The learned Judge has fixed the valuation by adopting twelve years' purchase whereas the claimant wanted the calculation to be made upon thirty years' purchase. There is no evidence on the record upon which it could be decided that any particular number of years' purchase should be taken as the basis. There was no material for the learned Judge to fix it at twelve years' purchase, and the claimant himself did not put for-

Sub-Collector, Rajahmundry *v.* Parthasarathi Naidu.

Krishnaswami Ayyangar, J.

ward any material for persuading the Court to accept his basis, namely, thirty years' purchase. The learned Judge is apparently of the opinion that twenty years' purchase is the maximum compensation payable. In this he is wrong. The number of years' purchase which should be adopted in a given case must vary with individual cases and will have to be decided upon the material placed before the Court. As we have already pointed out, the learned Judge also fell into an error in taking the gross rental value for purposes of capitalisation instead of the net annual value.

In the absence of evidence on the point, we think that twenty years' purchase should be adopted as the basis for fixing the market value. This is ordinarily adopted as the basis and we see no reason to depart from the rule of ordinary practice. Our attention has been drawn to two decisions of this Court, the first of which is reported in *Collector of Kistna* v. *Zamindar of Challapalli*[1] and followed in the second of the cases cited, namely, *Land Acquisition Officer, Calicut* v. *Subba Rao.*[2] The first of these cases deals with the compensation awardable in respect of the melvaram right of a zamindar on zamindari property. The second of the cases has reference to a site with a building thereon in the town of Calicut. It extends the principle of the decision in *Collector of Kistna* v. *Zamindar of Challapalli.*[1] The learned Judges make the following statement:—

> "It is clearly laid down in the case already cited that it has long been the practice of the Courts in this Presidency to calculate the profits from any form of landed property as equal to the profits made by investing money in gilt-edged securities."

We are unable to discover in the judgment in the case referred to any statement of law to this effect. On the other hand, Venkatasubba Rao, J., has expressly stated that there is no uniform or rigid practice in regard to the number of years' purchase and cites three cases in support of the statement, *Harish Chunder Neogi* v. *Secretary of State for India in Council,*[3] *Secretary of State for India in Council* v. *Shanmugaraya Mudaliar*[4] and *Secretary of State for India in Council* v. *Sham Bahadoor.*[5]

After all the function of the Court in awarding compensation is to ascertain the market value of the land at the date of the notification under section 4 (1). Where definite material is not forthcoming either in the shape of sales of neighbouring land at or about the date of the notification or otherwise, the Court can only proceed to do the best it can under the circumstances. In the present case we think we shall not be erring on the wrong side if we say that the market value should be fixed by capitalising the net annual income at twenty years' purchase. We accordingly hold that the respondents should have been given compensation at the said rate.

1. (1937) 2 M.L.J. 744: I.L.R. (1938) Mad. 431.
2. (1941) 2 M.L.J. 75.
3. (1907) 11 C.W.N. 875.
4. (1893) L.R. 20 I.A. 80: I.L.R. 16 Mad. 369 (P.C.).
5. (1884) I.L.R. 10 Cal. 769.

Sub-Collector, Rajahmundry v. Parthasarathi Naidu.
—
Krishnaswami Ayyangar, J.

In the result the appeal fails and the cross-objections are allowed to the extent of the difference between the amount awarded by the District Judge and the amount to be calculated on the basis mentioned above. On this basis it is agreed between the parties that the respondent will be entitled to Rs. 3,090 in all including the fifteen per cent. compensation. The amount awarded by the lower Court is varied by substituting for it the figure Rs. 3,090. The respondent will also be entitled to the interest on the excess from the date of the taking up of possession by the Government to the date of payment. The appeal will be dismissed with costs but the appellant will pay only half the costs of the respondent in the memorandum of cross-objections which is partially allowed as mentioned above.

Appeal dismissed and memorandum of objections partially allowed.

K.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KUNHI RAMAN.

Katragadda Rajabapayya .. *Appellant** (*Plff.*)

v.

Devineni Basavayya and another .. *Respondents* (*Defts.*).

Rajabapayya v. Basavayya.

Limitation Act (IX of 1908), section 14—Scope and applicability—Petition by payee under promissory note for adjudication of maker an insolvent—Hearing of petition and dismissal on merits—Subsequent suit on promissory note—Section 14 of Limitation Act not applicable to save limitation.

Practice—Costs—Defendant succeeding on a plea of limitation—Not a ground for depriving him of his costs.

A promissory note in favour of the plaintiff was executed in 1929 by the 1st defendant against whom in February, 1932, the plaintiff filed an insolvency petition which remained pending for nearly eight years and was finally dismissed in December, 1939. In August, 1940, the plaintiff brought a suit on the promissory note claiming that the suit fell within the provisions of section 14 of the Limitation Act. The reason for the dismissal of the insolvency petition was that the plaintiff's allegation, that the 1st defendant had alienated the greater part of his property in order fraudulently to prefer certain creditors and to defeat the interests of others, was found against. On the facts of the instant case,

Held, that section 14 of the Limitation Act cannot be of any assistance to the plaintiff as the words "unable to entertain it" in that section cannot apply to the action of the Insolvency Court as the petition was heard on the merits and the case was not one in which the Insolvency Court was debarred from entertaining the petition.

Firm Lorind Chand v. *Bahadur Khan*, A.I.R. 1935 Lah. 736 and *Alagappa Chettiar* v. *Somasundaram Chettiar*, 1937 M.W.N. 465, distinguished.

The plea of limitation is in no sense an unjust plea and it cannot be said that because a defendant has succeeded on a plea of limitation he should not be granted his costs.

Appeal against the decree of the Court of the Subordinate Judge of Tenali, dated 10th December, 1940 and passed in O.S. No. 40 of 1940.

P. Satyanarayana Rao for Appellant.

K. Raghuramiah and *N. V. B. Sankara Rao* for Respondents.

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*Appeal No. 213 of 1941. 14th August, 1942.

Rajabapayya *v.* Basavayya.

King, J.

The Judgment of the Court was delivered by

King, J.—This appeal arises from a suit brought on a promissory note executed in 1929 by the 1st defendant against whom in February, 1932, the plaintiff filed an insolvency petition. That insolvency petition for reasons into which we need not enter remained pending for nearly eight years and was finally dismissed in December, 1939. It was in August, 1940, that the plaintiff brought the present suit on the promissory note. On a cursory inspection of the dates of course it will be seen that such a debt would be barred by limitation, but the plaintiff contended that his suit fell within the provisions of section 14 of the Limitation Act. The learned Subordinate Judge refused to accept this contention and dismissed the suit on this one question of limitation leaving the other issues untried. In so doing he awarded no costs to the defendants, stating merely that he passed this order "under the circumstances of the case". Against this the plaintiff has appealed and the two defendants have filed a memorandum of cross-objections.

Section 14 of the Limitation Act runs as follows:

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

It must now be mentioned that the reason why the insolvency petition was dismissed was that the plaintiff charged the 1st defendant with having alienated the greater part of his property in order fraudulently to prefer certain creditors and to defeat the interests of others and it was finally held that these alienations did not amount to any such fraudulent preference. It seems to us perfectly clear from an examination of the language of section 14 that it cannot be of any assistance to the appellant. In the first place, it is obvious that the words "unable to entertain it" cannot apply to the action of the Insolvency Court. This is not a case in which an Insolvency Court was debarred from entertaining a petition filed by the appellant. That petition specifically mentioned the facts which it was necessary to prove in order to show that the 1st defendant was an insolvent and all that the Insolvency Court has done is to hold that those facts have not been proved. The whole petition has been disposed of on its merits and to say that a Court which has considered all the merits of a case and held that the facts alleged by a petitioner have not been proved and therefore dismissed his application is unable to entertain it seems to us to be stretching a liberal interpretation of language to an impossible length.

The learned advocate for the appellant relies upon two rulings and in particular one reported in *Firm Lorind Chand* v. *Bahadur Khan*.[1] That is a case which is almost on all fours with the present case in so far as the other civil proceeding there considered was an attempt to adjudicate a defendant an insol-

1. A.I.R. 1935 Lah. 736.

Rajabapayya
v.
Basavayya.

King, J.

vent. Section 14 was applied by the learned Judges without any consideration, however, of the words "unable to entertain it". In our view it was unnecessary for them to consider those words because they make it clear on page 737 that the real reason why that insolvency petition should have been dismissed and was eventually dismissed was that the acts of insolvency alleged in the petition itself were vague and indefinite and did not fall within the definition of that expression in the Provincial Insolvency Act. That means when paraphrased, that the Insolvency Court could have discovered for itself by referring to the section of the Insolvency Act and the recitals of the petition before it that it had no jurisdiction to consider those recitals on their merits. That is a case which is fundamentally different from the case here where the Court could not have dismissed the insolvency petition *in limine* but was bound to consider it on its merits. The other case is of a Bench of this Court reported in *Alagappa Chettiar* v. *Somasundaram Chettiar*.[1] That case does not deal with insolvency. It is a case where a suit was eventually filed under section 73 of the Code of Civil Procedure after the plaintiff had made an unsuccessful attempt to get an order under that section revised by the High Court. The High Court refused to interfere in revision on the ground that the remedy by suit had all along been open to the plaintiff. Of course in one sense of the word it is not true to say that the High Court had no jurisdiction to entertain the revision petition or that it dismissed it from any defect of jurisdiction, but when the High Court dismissed it because another remedy was open to the plaintiff, that in effect amounted to a declaration of the High Court that it would not consider the petition on its merits for a reason which was very similar to or "of a like nature" to lack of jurisdiction.

As we have already indicated, the real question in this case is the interpretation of section 14. Section 14 has no doubt been rightly applied if we may say so with respect both by the learned Judges of the Lahore High Court and the learned Judges in this Court to the facts which they had before them. We are quite unable to hold that it can be applied to the facts of the present case. We think the decision therefore of the learned Subordinate Judge was right and this appeal must be dismissed with costs.

On the question of the Memorandum of cross-objections a full discretion is vested in the trial Court with reference to the matter of costs. But section 35 lays down that if the Court does not follow the regular rule that costs shall follow the event, it must state its reasons in writing. We are unable to hold that a mere reference to the circumstances of the case with no further detail mentioned is a sufficient compliance with the provisions of section 35 (2) of the Civil Procedure Code. When we examine the circumstances of the case all that appears is this, that upon the issue of limitation the plaintiff has failed and the defendants have succeeded. There has been no trial upon the other issues. The plea of limitation is in no sense an unjust plea. Limitation

1. 1937 M.W.N. 465.

Rajabapayya v. Basavayya. — King, J.

is provided for by the laws of the land just as any other plea is provided for and we cannot subscribe to the doctrine that because a defendant has succeeded on a plea of limitation he should not be granted his costs. We therefore think that this is a fit case for interference with the order of the learned Subordinate Judge. At the same time the fact remains that the other issues have not been tried and if they had been it might have been discovered by the Court that on issues of fact the defendants had no good case. We think that in the circumstances of the case we should order that in the lower Court the plaintiff do pay the defendants' costs but that those costs be fixed at Rs. 100 only in view of the fact that the other issues in the case were left untried.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Dasi Parvathi Ammal .. *Appellant** (*Plff.*)

v.

Dasi Angamuthu and others .. *Respondents* (*Defts.*).

Parvathi Ammal v. Angamuthu.

Mortgage—Suit by bona fide *transferee for valuable consideration—Plea of want of consideration for mortgage—Maintainability in defence.*

The fact that the plaintiff is a *bona fide* assignee for valuable consideration of a mortgage bond cannot stand in the way of the defendant successfully pleading that the mortgage bond was not supported by consideration and hence no decree could be passed in favour of the plaintiff.

Appeal against the decree of the District Court of Coimbatore in Civil Appeal No. 542 of 1939 preferred against the decree of the Court of the District Munsiff of Tirupur in O.S. No. 95 of 1938.

A. V. Narayanaswami Aiyar for Appellant.

K. V. Ramachandra Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant before this Court and she filed a suit as assignee of a mortgage-deed executed to Konavaikalpalayam Gopala Gokula Virdhi Nidhi, Ltd., for recovery of money due under it. Defendants 2, 4 and 5 alone contested the suit. The others were *ex parte*. Their case was that the suit mortgage was not supported by consideration. Both the Courts held that the document was not supported by consideration and dismissed the suit. Hence this second appeal.

The decision as to whether the document was supported by consideration or not is a question of fact, and I do not feel justified in interfering with a concurrent finding of fact by two Courts on a point like this. It is urged, however, that the learned District Judge committed an error when he sought to draw an inference with regard to the passing of consideration from an endorsement of payment on the mortgage-deed, Ex. I, made in 1934. But I do not think I will be justified in brushing aside the finding of the lower appellate Court on that ground. There is nothing to indicate that the learned District Judge was not aware of the date of the endorsement. As a matter of fact, he refers to the evidence of P.W. 2 with regard to this endorse-

*S. A. No. 315 of 1941. 16th July, 1942.

ment and his evidence was that the endorsement included Rs. 1,000 paid on behalf of the bank. In these circumstances, I do not think there is any error or misstatement of fact on which the finding is based. The question how far he was justified in appreciating the evidence in the way in which he did and came to the conclusion is not a matter to be considered by this Court. There were materials on which the lower Court could have come to the conclusion it arrived at and therefore it would not be open to me to interfere with it. It is significant that the first Court has given a finding without reference to Ex. I (*a*) and I do not think that that finding was arrived at on irrelevant evidence or was perverse.

It is next urged that even though the suit hypothecation bond is not supported by consideration, such a plea is not available against the plaintiff who is a *bona fide* transferee of the mortgage bond for valuable consideration. No authority of this Court has been cited for this position that a plea of want of consideration in a suit filed by an assignee of a hypothecation deed cannot be allowed if the plaintiff is a *bona fide* assignee for valuable consideration. In *Jogendra Kishore* v. *Salamat Khan*[1] a similar plea was sought to be raised on the strength of section 41 of the Transfer of Property Act. But Mr. Justice Mitter pointed out that section 41 of the Transfer of Property Act on which the plea was based did not apply to the case of mortgages but only to sales and he has dealt with the point at great length and I entirely agree with his finding. It is true that Mr. Justice Jack was of opinion that an interest of the mortgagee itself was immovable property and where the owner of that property transferred it, the rights of the *bona fide* purchaser for value from the ostensible owner of that property would be protected under section 41. I prefer to follow the ruling of Mr. Justice Mitter. My attention was also drawn to another ruling in *Ramsumran Pershad* v. *Rampertab Singh.*[2] The facts of that case are different. There the mortgage was impeached and their Lordships had to consider whether they could permit a party to impeach the genuineness of a transaction of a *bona fide* purchaser for value. This is what was stated there:

"The situation here is, in fact, stronger than even a case where the true owner has placed an ostensible transferee in a position to mislead a *bona fide* purchaser for value without notice of the secret title; the mortgage, the suit thereon, the execution sale, and the delivery of possession through Court, constitute an elaborate network of devices sufficient to induce the belief that the title of Jhas had vested in Manojinarayan Singh. Consequently, the rule applies by which a *bona fide* transferee for value from an ostensible owner is allowed to protect himself against a claim by the real owner."

There are no such circumstances in this case. The fact that the plaintiff is a *bona fide* holder for consideration, I do not think, can stand in the way of the defendant successfully pleading that the suit mortgage bond was not supported by consideration and hence no decree could be passed in favour of the plaintiff.

1. A.I.R. 1930 Cal. 92.
2. (1915) 22 C.L.J. 574.

Parvathi Ammal v. Angamuthu.

In the result, the second appeal fails and is dismissed with costs of the 5th respondent alone.

Leave refused.

K.S. Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

P. Sankara Rao, (wrongly described as D. Sankara Rao) .. *Appellant** (*2nd Deft.*)

v.

Modepalli Bala Venkatappa .. *Respondent* (*Plff.*).

Sankara Rao v. Bala Venkatappa.

Execution—Pre-decretal agreement—When pleadable in bar of execution.

An agreement which relates to execution only and does not strike at the decree itself is pleadable in bar of execution. There is little difference between a case where the decree is rendered inexecutable against some only of the defendants or against some only of the properties and a case where a decree is rendered inexecutable against all the defendants or all the properties. Nor is there any sound principle of distinction on the ground that the agreement was made *before* suit and not *after* the institution of the suit.

Case-law discussed.

Appeal against the order of the District Court of Cuddapah, dated 15th November, 1940, and made in E.P. No. 4 of 1940 in O.S. No. 35 of 1933 on the file of the Court of the Subordinate Judge, Anantapur.

P. Somasundaram for Appellant.

V. S. Narasimhachar for Respondent.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.

Krishnaswami Ayyangar, J.—The 2nd defendant is the appellant. His father who was the 1st defendant in the suit had executed a mortgage in favour of the respondent for Rs. 4,000 on 28th February, 1930. He died pending the suit and before the preliminary decree was passed. The preliminary decree was passed on 9th February, 1934. It was followed by a final decree, dated 22nd September, 1936. The respondent then sought to execute the decree by filing E.P. No. 4 of 1940 on the file of the Court below. The appellant pleaded an agreement, dated 24th August, 1931, in bar of execution. The question is whether the agreement can be allowed to be pleaded so as to prevent the decree from being executed.

The agreement recites that the adoptive father of the appellant (1st defendant) had become a gambler and had been utilising his properties for illegal purposes and consequently there was disagreement between the father and the son. It then states that for the purposes of safeguarding the property and bringing about harmony between them, the father executed in favour of the respondent the suit mortgage for Rs. 4,000 besides two promissory notes. The agreement then states that the suit mortgage had been executed *benami* and the respondent had paid no money therefor. Then follow the following sentences:

*A.A.O. No. 48 of 1941. 3rd July, 1942.

Sankara Rao v. Bala Venkatappa.

Krishnaswami Ayyangar, J.

> "Within a period of twelve years from the date of this deed of simple mortgage, if your adoptive father would turn favourable to you and allow the entire property to pass on to you without any disputes whatever, I shall return to you the *benami* deed of mortgage duly cancelled so that there might not arise any disputes regarding the said deed. On the other hand, if he would remain inimical and if I have to file a suit and obtain a decree, I shall have the decree cancelled without executing the same in case the property would pass on to you."

The first sentence contemplates a case where the father changes his mind towards his son and becomes favourable to him so as to allow the entire property to pass on to him. If this happened the respondent undertook to return the deed of mortgage duly cancelled. The next sentence contemplates a different contingency, namely, if the father continues to be inimical towards the appellant, the respondent was to institute a suit on the mortgage and obtain a decree. But after obtaining a decree he should not execute it but have it cancelled if the property should by that time pass on to his son, *i.e.*, if the adoptive father should die.

On the facts of the case the second of the contingencies has happened by the death of the appellant's adoptive father after the trial but before the passing of the decree and the appellant therefore contends that he is entitled to rely on the agreement and call upon the respondent to desist from executing the decree which he had undertaken to cancel in case the father died and the properties passed on to the appellant. It may be mentioned before proceeding further that till the passing of the decree, the appellant was allowed under the terms of the agreement to remain quiet; and he had no right to object to the passing of the decree itself. It is only when the decree-holder seeks to execute the decree after the property had passed on to him that the appellant would have a grievance and would be entitled to complain that the terms of the agreement were being violated. In other words, we have before us an agreement which could not be pleaded until after the decree was passed and steps were taken by the respondent to execute it.

The learned District Judge was of opinion that the agreement cannot be pleaded as its effect in substance was to render the decree inexecutable; in other words to make it a nullity as he calls it. As we understand the learned Judge, he seems to be of the opinion that every agreement which bars execution of a decree operates to nullify a decree and therefore to abrogate it altogether. In *Venkatasubba Mudali* v. *Manickammal*,[1] the identical question appears to have been considered by Wallace and Madhavan Nair, JJ., and they laid down the proposition that a pre-decree arrangement that a decree when obtained should not be executed can be pleaded in bar of execution. In other words, even where execution was absolutely prohibited by the agreement, such an agreement can be pleaded. There have been a great many cases decided upon this point by this and other Courts. The latest is the case of *Papamma* v. *Venkayya*,[2] where the following state-

1. (1925) 50 M.L.J. 364: I.L.R. 49 Mad. 513.
2. (1935) 69 M.L.J. 451: I.L.R. 58 Mad. 994 (F.B.).

Sankara Rao v. Bala Venkatappa.

Krishnaswami Ayyangar, J.

-ment of principle made by Pakenham Walsh, J., in *Butchiah Chetti* v. *Tayar Rao Naidu*[1] was approved:

"On a review of the authorities it appears to us that the Full Bench case, *Chidambaram Chettiar* v. *Krishna Vathiyar*,[2] only covers agreements which relate to execution and not to agreements which attack the decree itself."

What was meant is that agreements which relate to execution only not those which strike at the decree itself are pleadable in bar of execution. There were several judgment-debtors in the case before the Full Bench. The first of them, namely, the first judgment-debtor pleaded an agreement by which the decree-holder had undertaken not to execute the decree as against him. The effect of the agreement obviously was that the decree was rendered inexecutable so far as one of the judgment-debtors was concerned. Pandrang Row, J., who delivered the judgment of the Full Bench observed as follows:

"The first judgment-debtor does not seek to vary the terms of the decree; it is not his case that the terms of the decree were varied by the oral agreement, but that it was agreed that the decree against him should not be executed. An agreement not to execute a decree does not vary its terms, and in the present case the agreement pleaded is not one to which all the parties to the decree are parties but only some of them, as the other defendants are not parties to it."

Taking hold of the latter half of the second sentence in this passage, the learned advocate for the respondent urges that if the agreement had the effect of rendering the decree wholly inexecutable against all the defendants and not merely as against one or some of them, the agreement would hit at the decree itself and not merely bar its execution. We are not satisfied that any such distinction in the principle to be applied was in the mind of the learned Judges at all. We see little difference between a case where the decree is rendered inexecutable against some only of the defendants or against some only of the properties and the case where a decree is rendered inexecutable against all the defendants or all the properties. Our attention was also called to another circumstance, namely, that the decision of the Full Bench in *Papamma* v. *Venkayya*[3] had reference to an agreement between the parties *after* the institution of the suit and not one as in the present case entered into *before* suit. Here again we are unable to see any sound principle of distinction and we have the satisfaction of seeing that the same view was adopted in the decision of this Court in *Butchiah Chetti* v. *Tayar Rao Naidu*[1] by a Bench of two learned Judges Beasley, C.J. and Pakenham Walsh, J.

We are of opinion that the learned Judge erred in declining to permit the agreement to be pleaded. The order of the learned Judge is therefore set aside and the learned District Judge is directed to restore the petition to his file and dispose of it according to law. The appellant is entitled to his costs of the appeal in this Court from the respondent.

K.S. ——— *Appeal allowed.*

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1. (1930) 60 M.L.J. 721: I.L.R. 54 Mad. 184.
2. (1916) 32 M.L.J. 13: I.L.R. 40 Mad. 233 (F.B.).
3. (1935) 69 M.L.J. 451: I.L.R. 58 Mad. 994 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE BELL.

Kesarichand Kaverlal .. *Appellant**

v.

S. H. G. Nayudu and another .. *Respondents.*

Kesarichand Kaverlal *v.* S. H. G. Nayudu

Government of India Act (1935), section 270—Scope—Act done in the course of official duty—Income-tax Officer seizing books of account of assessee—Suit for damages for trespass—Previous sanction of Governor-General if necessary—Rejection of plaint—Civil Procedure Code (V of 1908), Order 7, rule 11 (d).

The plaintiff claimed damages against the defendants who were Income-tax Officers for alleged acts of trespass. The plaint stated that the plaintiff was a businessman whose income-tax affairs at all material times were dealt with by the defendants. It further stated that on a particular day the 2nd defendant alleging and purporting to act under the orders of his superior officer, the 1st defendant entered the plaintiff's premises and took away all his books of account against his will and consent. The defendants contended among other things that the suit was not maintainable in the absence of the previous sanction of the Governor-General under section 270 of the Government of India Act.

Held, that the acts alleged against the defendants were closely connected with their position as Income-tax Officers, that the case was governed by section 270 (1) of the Government of India Act and the consent of the Governor-General not having been obtained Order 7, rule 11 (*d*), Civil Procedure Code, applied and the plaint should therefore be rejected.

Section 270 is intended to protect public servants for acts committed before the relevant date in respect of which proceedings may be started against them. What has to be looked at in a given case is whether the offence was in respect of an act done or purported to be done in execution or discharge of an official duty, and the motive with which the act is done is immaterial. *Hori Ram Singh* v. *The Crown*, (1939) 2 M.L.J. (Supp.) 23: 2 F.L.J. 153: I.L.R. 21 Lah. 400 at 425 and *Nandkumar Singh* v. *Rai Bahadur Pashupati Ghosh*, (1941) I.L.R. 20 Pat. 417 at 423: 4 F.L.J. (H.C.). 161, referred to.

V. V. Srinivasa Aiyangar, V. V. Devanathan and *V. V. Ramadurai* for Plaintiff.

K. V. Sesha Aiyangar assisted by *N. S. Mani* and *K. S. Srinivasan* for Defendants.

The Court delivered the following

JUDGMENT.—In this case the plaintiff claims damages against two defendants for alleged acts of trespass. The plaint states that the plaintiff is a businessman whose income-tax affairs at all material times were being dealt with by the two defendants who were Income-tax Officers, the 1st defendant being the superior officer of the 2nd defendant. The plaint goes on to say that the two defendants were investigating the plaintiff's affairs, that there had been various interviews on the usual income-tax grounds and that on the 30th August, 1939, the 2nd defendant "alleging and purporting to act under the orders of a superior officer (who was at that time the '1st defendant') entered (the plaintiff's) premises" and took away all the plaintiff's books of account against his will and consent. That is in paragraph 7 of the plaint.

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*C.S. No. 123 of 1940. 3rd March, 1942.

Kesarichand Kaverlal *v.* S. H. G. Nayudu

Paragraph 11 goes on to say that "the 2nd defendant when questioned as to the authority by which he trespassed into the said premises of the plaintiff and wrongfully took away the said account books intimated and represented to the plaintiff that he was in so acting, acting under the directions and orders of his officer namely the 1st defendant". The defendants in their written statements deny the allegations of the plaintiff and issue was joined on those pleadings. I have given leave for an additional issue to be framed under the Government of India, Act, 1935, upon which a preliminary point has now been taken by the defendants.

They contend that the provisions of section 270 of the Government of India Act of 1935 apply to this case because, being Income-tax Officers they are servants of the Crown and as such are protected by that section unless the consent of the Governor-General is obtained for proceedings against them.

"No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India before the relevant date except with the consent of the Governor-General."

The relevant date so far as servants of the Crown are concerned is the date of the establishment of the Federation [*see* section 270 (3) and section 313 (3)].

Mr. Srinivasa Aiyangar has argued with considerable force that the section does not apply. But giving all the attention I can to his attractive reasoning the matter appears to me to be too plain to admit of any doubt. The section appears to have been intended to protect public servants for acts committed before the relevant date in respect of which proceedings may be started against them. Here the defendants are stated in the plaint to be Income-tax Officers and to have purported, or the 2nd defendant to have purported, to act as such in seizing the plaintiff's books of account. That in itself, in my opinion, would be enough to raise the question of the application of this section. On the many authorities which have been cited, it is clear that the motive with which the act is done is immaterial. What has to be looked at is that the offence must be in respect of an act done or purported to be done in execution of a duty, *i.e.*, in the discharge of an official duty. In *Hori Ram Singh* v. *The Crown*,[1] Sulaiman, J., observed as follows:

"It must purport to be done in the official capacity with which he pretends to be clothed at the time, that is to say under the cloak of an ostensibly official act, though, of course, the offence would really amount to a breach of duty. An act cannot purport to be done in execution of duty unless the offender professes to be acting in pursuance of his official duty and means to convey to the mind of another the impression that he is so acting".

This was a Federal Court decision on the construction of the section in question and it is stated at page 437 that for the section

1. (1939) 2 M.L.J. (Supp.) 23: 2 F.L.J. 153 at 170: I.L.R. 21 Lah. 400 at 425.

to apply "there must be something in the nature of the act complained of that attaches it to the official character of the person doing it". It appears to me that the acts alleged against the defendants here were so closely connected with their position as Income-tax Officers as to make it impossible to say that they were not the kind of acts which are contemplated under this section.

Mr. Srinivasa Aiyangar said, and rightly, that these cases raise in the main questions of fact. He added that it is impossible to decide the question of fact without hearing the evidence. But this matter was considered in a case reported in *Nandkumar Sinha* v. *Rai Bahadur Pashupati Ghosh*,[1] where at page 423, it is said:

"If an act done by a public officer is apparently an official act, its character as such will not be changed by allegations that it was done in bad faith or that it had not that character which it purports to have. Applicability of the statute depends on what the act purports to be and is not affected by allegations that the apparent state of things is not the real one. Were it not so, ingenious allegations could be invented and criminal motives recklessly attributed in every case so as to nullify the effect of the statute which the Court would be unable to apply until the entire suit had been heard out and those imputations proved on the facts to be untrue. The suit would in that case fail under section 270 (2) of the Government of India Act and the defendant would have had no additional protection by reason of the existence of sub-section (1) of this section".

Here as I have said the plaintiff in his plaint specifically sets up what is now the defendants' case in alleging that the 2nd defendant trespassed as an Income-tax Officer in purported execution of his duty as such and acting under the orders of his superior officer and with regard to the 1st defendant that he gave directions and orders to the 2nd defendant to do what he did. I therefore come to the conclusion that the preliminary point succeeds and that section 270 (1) applies. The consent of the Governor-General not having been obtained Order 7, rule 11 (*d*), appears to apply and the plaint therefore must be rejected with costs.

B. V. V. ——— *Suit dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

Narayanan Chetti and others .. *Appellants** (*Plaintiffs*)

v.

Nallammal and others .. *Respondents* (*Defendants*).

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Transfer of Property Act (IV of 1882), section 82—Scope—First mortgage satisfied by sale of portion of the property—Right of second mortgagee to claim contribution—Actual payment by second mortgagee to avert sale not essential.

If the first mortgagee does not cause the whole of the hypotheca to be sold for satisfying his mortgage the second mortgagee has the right to call upon the holder of the unsold portion to contribute his share of the principal debt.

1. (1941) I.L.R. 20 Pat. 417 at 423: 4 F.L.J. (H.C.) 161.

*S.A. No. 833 of 1940. 21st July, 1942.

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The right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that other property alone. There is no distinction in principle between a case where the payment in respect of which contribution is claimed is made to avert a legal process and a case in which payment has been enforced by the sale of the property itself. The liability to contribute is a liability which is imposed upon the land and therefore is not a personal liability.

Sesha Aiyar v. *Krishna Aiyangar*, (1900) I.L.R. 24 Mad. 96: 10 M.L.J. 383, overruled.

Appeal against the decree of the Court of the Subordinate Judge of Devakottai, dated 18th December, 1939, and passed in A.S. No. 26 of 1939, preferred against the decree of the Court of the District Munsiff of Devakottai in O.S. No. 162 of 1938.

R. Sethurama Sastri for Appellants.

K. Rajah Aiyar, K. Subramaniam and *V. Seshadri* for Respondents.

[This case coming on for hearing, the Court (King, J., made the following] :—

ORDER.

3rd March, 1942.

This appeal arises out of a suit filed for contribution under section 82 of the Transfer of Property Act. A single plot of land was mortgaged by one Swaminatha Aiyar to the grandfather of the plaintiffs in 1927. In 1928, the eastern portion of the land was gifted by Swaminatha Aiyar to his daughter, who eventually sold it in 1934 to defendant 1. In 1929 Swaminatha Aiyar executed a puisne mortgage of the western portion to plaintiffs' grandfather. In 1934 the first mortgage was assigned by plaintiffs' father to one Chidambaram Chettiar, and earlier in the same year defendant 2 became the owner in a Court sale of the equity of redemption in the western portion. Chidambaram Chettiar brought a suit to enforce his mortgage, and when the hpyotheca came to be sold it was ordered that the western portion should be sold first. It was sold accordingly and the sale proceeds were sufficient to pay off the first mortgage in full.

It is in these circumstances that plaintiffs, as the present owners of the puisne mortgage rights in the western portion, sue defendant 1 as owner of the eastern portion for contribution. Plaintiffs say that the amount due is Rs. 2,485, and is payable to themselves and to defendant 2 with priority in their favour to the extent of the money still due to them under the second mortgage. As defendant 2 would not join with them in filing the suit, they have impleaded him as a defendant, and have limited their claim to the sum of Rs. 1,600 due to themselves. Both the Courts below have held that in the circumstances of this case where plaintiffs have made no cash payment to discharge the prior mortgage they have no right to claim contribution. Hence this second appeal by the plaintiffs.

On an examination of the language of section 82 there seems no reason at all for rejecting a claim for contribution merely because it is made by a puisne mortgagee. Rights and liabilities are thrown by the section not upon individuals but upon

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items of property. It is undeniable that the plaintiffs are interested in the western item, just as much as, if not more than, defendant 2. On general principles therefore their right to suit seems clear, and that a puisne mortgagee can so sue as well as an owner, has been recognised by Madhavan Nair, J., in *Raghavachari* v. *Venkatanarayana Reddi*.[1]

The Courts below however have relied upon *Sesha Aiyar* v. *Krishna Aiyangar*,[2] as an authority to the contrary. It seems to me that they could not have done otherwise, as the essential facts in that case are precisely similar to those here. But with great respect I am unable to agree with the reasoning in that case. It is stated on page 107 that even if the plaintiff in that case had purchased the property instead of merely taking a mortgage on it he would have had no right to contribution. I am frankly unable to understand this. The whole purpose of section 82 surely is to give the owner of one property out of two comprised in a mortgage the right of contribution against the owner of the second property if the first property and the first property alone is sold to discharge the mortgage. The first property has borne an unfair share of the burden of the mortgage, and this essential fact is not altered by the undoubted right of the mortgagee to proceed against any property which he may choose. *Sesha Aiyar* v. *Krishna Aiyangar*,[2] if applied to the facts of the present case would appear to be authority for the position that even defendant 2 could not sue, a position which seems to me to reduce section 82 to a nullity. Now if defendant 2 can sue I see no reason why plaintiffs also should not sue, as they also are interested in the same item of property. And this right of suit seems to me to arise equally whether there has been a payment by plaintiffs in cash, or property in which plaintiffs are interested has been sold in execution. (See *Ibni Hasan* v. *Brijbhukan Saran*,[3] where *Sesha Aiyar* v. *Krishna Aiyangar*[2] is dissented from).

I accordingly with great respect do not feel inclined to follow *Sesha Aiyar* v. *Krishna Aiyangar*[2] in disposing of this appeal, and agree with the opinion of Madhavan Nair, J., in *Raghavachari* v. *Venkatanarayana Reddi*[1] that a subsequent mortgagee has a right to contribution whether he pays cash or not even though that opinion was given in a case in which cash was in fact paid. I submit the records to my Lord the Chief Justice with a request, that if he thinks fit, the case may be posted before a Bench or Full Bench.

(This case coming on for hearing in pursuance of the aforesaid Order, the Court delivered the following) :—

JUDGMENT :—This second appeal has been placed before a Full Bench for decision, as King, J., before whom the appeal came in the first instance, considered that the judgment of this Court in *Sesha Aiyar* v. *Krishna Aiyangar*,[2] on which the Courts below had relied required reconsideration. In order to appre-

1. (1934) 41 L.W. 416.
2. (1900) 10 M.L.J. 383: I.L.R. 24 Mad. 96.
3. (1904) I.L.R. 26 All. 407 at 416 and 435 (F.B.).

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ciate the application of *Sesha Aiyar* v. *Krishna Aiyangar*,[1] it is necessary to state the facts in the present case.

On the 28th June, 1927, one Swaminatha Aiyar mortgaged immovable property to the grandfather of the plaintiffs to secure the sum of Rs. 3,000. On the 14th December, 1928, the mortgagor conveyed to his daughter the eastern portion of the property. She took it, of course, subject to the mortgage of the 28th June, 1927. On the 4th November, 1929, the mortgagor borrowed Rs. 700 from the plaintiffs' grandfather on the security of a second mortgage of the western portion. On the 24th April, 1934, the 2nd defendant bought the western portion in a Court auction, subject to the two mortgages which Swaminatha Aiyar had created. On the 30th May, 1934, Swaminatha Aiyar's daughter conveyed her interest in the eastern portion to the 1st defendant. On the 6th September, 1934, the plaintiffs' father, the grandfather being dead, assigned the mortgage of the 28th June, 1927, to one Chidambaram Chettiar, who filed O.S. No. 227 of 1934 in the Court of the Subordinate Judge of Devakottai to enforce payment. On the 2nd April, 1935, a preliminary decree was passed in favour of Chidambaram Chettiar and a final decree followed on the 19th September, 1935. On the 27th October, 1935, the plaintiffs and their father separated and the second mortgage which Swaminatha Aiyar had created on the western portion of the property in suit fell to the plaintiffs' share of the family properties. On the 24th August, 1936, in execution of the mortgage decree obtained by Chidambaram Chettiar, the western portion was sold for Rs. 8,883-6-0 and bought by the 1st defendant. The price realized was sufficient to discharge the first mortgage, but only Rs. 155-13-2 remained and this was not sufficient to discharge the second mortgage. On the date on which the preliminary mortgage decree was passed in favour of Chidambaram Chettiar there was due on the second mortgage the sum of Rs. 1,294-8-0. On the 26th March, 1938, the present suit was filed to recover Rs. 1,600 from the 1st defendant as the owner of the eastern portion. The plaintiffs' case was that as the first mortgagee had not brought the whole of his security to sale she was liable under section 82 of the Transfer of Property Act to make contribution.

Section 82 of the Transfer of Property Act was amended in 1929. Before the amendment the first paragraph of the section read as follows:

"Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage."

This paragraph now reads as follows:

"Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the

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1. (1900) 10 M.L.J. 383: I.L.R. 24 Mad. 96.

debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.''

In deciding *Sesha Aiyar* v. *Krishna Aiyangar*[1] the Court was concerned with section 82 as it stood before the amendment, but the amendment makes no material change so far as this case is concerned. Now the section expressly refers to a case where the mortgaged property is subsequently divided into shares held separately and not merely to a case where several properties are mortgaged, and it is placed beyond question that the valuation for purposes of contribution shall be that at the date of the mortgage. Both before the amendment and now the liability to contribute is a liability which is imposed upon the land and therefore is not a personal liability.

At this stage it will be convenient to state the facts in *Sesha Aiyar* v. *Krishna Aiyangar*.[1] Certain immovable properties were mortgaged to one Rangayya Goundan. Later some of the lands comprised in the mortgage were, with other lands, mortgaged to the plaintiffs. After the second mortgage had been created Rangayya Goundan obtained a decree on his mortgage and in execution the portion of his security which was subject to the second mortgage in favour of the plaintiffs was sold. As in the present case the amount realised was sufficient to satisfy the full claim of the first mortgagee, and consequently the execution proceedings were carried no further. The mortgagors subsequently sold the surplus security to certain of the defendants. The plaintiffs then instituted the suit which gave rise to the appeal. They based their claim in the first place on the mortgage, and in the second place they claimed contribution from the holders of the properties which were not sold in execution. Shephard and Davies, JJ., who heard the appeal, held that section 82 did not apply and therefore the plaintiffs were not entitled to any contribution. The basis of their decision is to be gathered from the following passage in their judgment which is to be found at page 107 of the report:

"The first paragraph'' (of section 82) "does not provide for the keeping alive of the lien after the mortgage debt has been paid, for it merely declares the manner in which the debt shall be borne by the several properties. It would come into effect when the administration of the estate of the mortgagor was under consideration and may be taken to recognise a lien possessed by the person who, being interested in one of the mortgaged properties, pays off the debt and so acquires a right of contribution; but we do not think that the section gives any further right. In the present case the plaintiffs who certainly cannot be in a better position than they would be if they had simply bought part of the mortgaged property subsequently sold under Rangayya Goundan's decree, had their opportunity, and they might, by paying off the debt and saving the property from sale, have acquired a right of contribution secured by a lien on the other property."

In other words, persons in the position of the present plaintiffs do not come within section 82 unless they pay off the first mort-

1. (1900) 10 M.L.J. 383: I.L.R. 24 Mad. 96.

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gagee. The section certainly does not say this, but before taking the matter further we will examine some of the authorities quoted to us in the course of the arguments.

The first of these cases is the Bench decision of this Court in *Ramabhadrachar* v. *Srinivasa Aiyangar*,[1] where section 82 was correctly applied. There a joint family consisted of a father and three sons. The father mortgaged certain lands and subsequently the family became divided. By the terms of the partition the father and his sons each took a fourth share in the family estate and each became liable for a fourth of the mortgage debt. One of the sons sold the greater portion of his share in the mortgaged property to the plaintiff, to whom he gave a bond and mortgaged other lands to secure the plaintiff from loss should the original mortgagee bring the property subject to the mortgage to sale. The mortgagee sued to enforce his mortgage and obtained a decree, whereupon a portion of the hypotheca was sold, and the portion sold included the property which the plaintiff had bought. The proceeds of sale proved sufficient to discharge the mortgagee's decree, whereupon the plaintiff sued upon his security bond, and the land hypothecated to him was sold. As the result of this the plaintiff received the amount secured by the bond. It was not sufficient to discharge the debt due to him and he brought a suit under section 82 of the Transfer of Property Act in which he claimed rateable contribution from the portions of the mortgaged property which had not been sold to satisfy the mortgagee's decree. The Court held that he was entitled to recover and that his right to rateable contribution was in no way affected by the security bond or the payment which he had received thereunder. It was contended that the arrangement between the father and the sons under which each son took a fourth share of the family estate, each being liable for a fourth of the mortgage debt created by the father, precluded the application of section 82, but the Court held that the words "in the absence of a contract to the contrary" in that section apply to contracts between a mortgagor and a mortgagee and that an agreement binding only as between the mortgagors is not a contract to the contrary within the meaning of the section. The facts in that case are different from the facts in the present case and those in *Sesha Aiyar* v. *Krishna Aiyangar*,[2] but Madhavan Nair, J., in *Raghavachari* v. *Venkatanarayana Reddi*,[3] criticized *Sesha Aiyar* v. *Krishna Aiyangar*[2] on the basis of the judgment in *Ramabhadrachar* v. *Srinivasa Aiyangar*.[1]

The Allahabad High Court has indicated its dissent from the judgment in *Sesha Aiyar* v. *Krishna Aiyangar*,[2] in more than one case. In *Ibn Hasan* v. *Brijbhukan Saran*,[4] Banerji, J., said that he could see no distinction in principle between a case where the payment in respect of which contribution is claimed is made

1. (1900) I.L.R. 24 Mad. 85.
2. (1900) 10 M.L.J. 383: I.L.R. 24 Mad. 96.
3. (1934) 41 L.W. 416.
4. (1904) I.L.R. 26 All. 407 (F.B.).

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to avert a legal process and a case in which payment has been enforced by sale of the property of the claimant for contribution. In both cases his claim is based upon the ground that his property has contributed more than what it is liable for, and that the defendant is benefited thereby. These remarks were prefaced by the statement that he was unable to agree with the view of the learned Judges who had decided *Sesha Aiyar* v. *Krishna Aiyangar*.[1] Stanley, C.J., in *Muhammad Yahiya* v. *Rashid-ud-din*,[2] pointed out that the right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that other property alone. The decision in that case certainly runs counter to that in *Sesha Aiyar* v. *Krishna Aiyangar*.[1]

The governing factor here is what section 82 of the Transfer of Property Act says, and the learned Judges who decided *Sesha Aiyar* v. *Krishna Aiyangar*[1] had not sufficient regard to its wording. That decision if allowed to stand would mean that persons in the position of the plaintiffs would lose everything unless they were sufficiently well off to discharge the prior mortgage. It would not only be most unjust, but it would mean inserting into the section a provision which is not there and a provision which runs counter to its tenor. In order to avoid this conclusion Mr. Rajah Aiyar, who represents the respondents, has suggested that a second mortgagee is in the position of a mortgagor and a mortgagor cannot claim contribution. A second mortgagee does not stand in the shoes of a mortgagor. Where there is a second mortgage, the second mortgagee holds a mortgagee's interest in the property and the fact that some other person has previously received a mortgagee's interest does not detract from the nature of his interest. When a person agrees to lend money on the security of a second mortgage of a portion of the property he knows that the first mortgagee has the benefit of the whole of the property, and that the first mortgagee, if he calls in the mortgage loan, will have the right to cause the whole of the hypotheca to be sold. If the first mortgagee does not cause the whole of the hypotheca to be sold, the second mortgagee has the right, as the section stands, to call upon the holder of the unsold portion to contribute his share of the principal debt. All that persons in the position of the present plaintiffs ask is that the holder of the unsold portion of the hypotheca shall bring into Court the proportion of the amount of the first mortgagee's debt which is allottable to the portion held by him. In our opinion the plaintiffs as the second mortgagees of the western portion have an interest in the portion sold and come within the principle stated by Stanley, C.J., in *Muhammad Yahiya* v. *Rashid-ud-din*.[2]

For the reasons given we consider that *Sesha Aiyar* v. *Krishna Aiyangar*[1] was wrongly decided. The appeal will be allowed, which means that the case will be sent back to the trial

1. (1900) 10 M.L.J. 383: I.L.R. 24 Mad. 96.
2. (1908) I.L.R. 31 All. 65.

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Court to ascertain the amount which the plaintiffs are entitled to recover by way of contribution from the 1st defendant.

The plaintiffs are entitled to their costs here and below.

K. S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KUNHI RAMAN.

M. V. Mahalinga Aiyar .. *Appellant** (*1st Deft.*)

v.

The Union Bank, Limited, Kumbakonam .. *Respondent* (*Plff.*).

Mahalinga Aiyar v. Union Bank, Limited, Kumbakonam.

Indian Contract Act (IX of 1872), sections 126, 132 and 135—Promissory note executed by two persons with words "security for overdraft" at the top—One of them the real borrower—Liability of both of them under promissory note unaffected by the nature of any contract between them.

Where a promissory note was executed in favour of a bank by two persons who bound themselves jointly and severally to pay the sum mentioned in the note with interest, and the note though not in English contained at the top of it the words 'security for overdraft' and it was contended by one of the executants that since his co-executant had executed a trust deed subsequently, putting all his properties in the hands of trustees for satisfying his creditors, section 135 of the Contract Act would apply and he should be deemed to be discharged from liability,

Held, that in order to plead that he was a surety under the Indian Contract Act he should have been a party to a contract of guarantee. The fact that he did not borrow himself but only acted to guarantee the borrowing by the co-executant cannot affect the fact that the contract between him and the bank was expressed in a promissory note and according to the provisions of section 132 whatever the contract might have been between the executants of the note and whatever might be the knowledge of the bank of that contract, the liability of both of them under the promissory note was quite unaffected by that fact.

Appeal against the judgment, dated 11th April, 1940, of the Court of the Subordinate Judge of Kumbakonam in O.S. No. 24 of 1938.

C. Padmanabha Aiyangar for Appellant.

S. Ramachandra Aiyar for Respondent.

The Judgment of the Court was delivered by

King, J.

King, J.—This suit was brought in 1938 by the Union Bank, Limited, Kumbakonam, against a number of defendants of whom the case of the 1st defendant only need now be considered. It was based upon a promissory note signed by one V. R. Srinivasan on the 21st August, 1935, and signed also by the 1st defendant V. M. Mahalinga Aiyar. That promissory note is for Rs. 8,500 and both the executants bind themselves jointly and severally to pay the bank that sum with interest. The figure Rs. 8,500 is found at the top left hand corner of the promissory note and above it are the words in English, the whole of the promissory note being also in English, "security for overdraft". It is the case of the bank that at that time V. R. Srinivasan who was the managing director of the bank had an overdraft account. It

*Appeal No. 182 of 1940. 20th August, 1942.

was necessary for all persons having overdraft accounts to have a co-obligant. The previous co-obligant, Swaminatha Aiyar, had virtually become insolvent, and it was therefore necessary for V. R. Srinivasan to find some one else. He accordingly induced the 1st defendant to join with him as co-obligant in the signing of this promissory note. In 1937, V. R. Srinivasan fell upon evil days and on the 7th February executed a trust deed putting all his property in the hands of trustees for the purpose of satisfying his creditors. As V. R. Srinivasan thus failed, the bank is proceeding against the 1st defendant in this suit. There is no dispute that the amount of the claim is correctly calculated, and is due on the state of V. R. Srinivasan's overdraft account. The 1st defendant raised many defences all of which have been rejected by the learned Subordinate Judge and the suit has been decreed. As a result the 1st defendant has filed this appeal.

The first question which arises is a question of fact. The 1st defendant denies that he executed any promissory note for Rs. 8,500 and denies that he executed any document as security for any overdraft. * * * * *

[After discussing the evidence his Lordship concluded:]

There can be no doubt, we think, that the 1st defendant did sign this document, Ex. A, knowing that he was signing a document for Rs. 8,500 and knowing that he was doing so as security for V. R. Srinivasan's overdraft.

All possible doubt on this matter is removed by Ex. E (1) the letter which the 1st defendant sent to the bank when the bank first made its demand upon him for the settlement of the overdraft account. That letter was dated the 20th March, 1937. No doubt the 1st defendant repudiates the letter entirely and explains that he had entrusted his uncle with a signed blank sheet of paper, and that all the statements made in that letter are the result of a conference held between his uncle and V. R. Srinivasan's advocate. We are utterly unable to believe this or to believe that the 1st defendant would give a signed blank sheet of paper to anybody. He also pretends that, although his uncle had been managing his affairs for many years, and they had been on good terms, he had never told his uncle the real facts about the transaction of 1935 before he handed over the sheet of paper into his uncle's hands. The whole story is, in our opinion, fantastic and we are quite certain that if the uncle negotiated on behalf of the 1st defendant he did so with knowledge of the facts and that the statements contained in Ex. E (1) are the result of the 1st defendant's own information.

It is no doubt sought to be argued on behalf of the 1st defendant that he did not think that he was rendering himself liable for an overdraft account, that he thought that the word overdraft meant merely that a single loan was about to be advanced by the bank and that his liability would cease the moment that loan was repaid. Not only is this explanation falsified by the common acceptation of the term overdraft but it is quite clear from the contents of Ex. E (1) that in 1937 the 1st defendant

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was unable to think of any such case. Of course if that had in fact been the contract between him and Srinivasan there would have been no impediment whatever to his stating so explicitly in his answer to the bank. There can be no doubt therefore that subject to what is now to be said the 1st defendant is liable upon Ex. A.

The 1st defendant however now relies upon an additional fact that V. R. Srinivasan executed a trust deed in February, 1937, and that the bank assented to the trust deed and was prepared to take whatever dividend might be rendered available by the trustees from Srinivasan's estate. It is argued that by this action section 135 of the Indian Contract Act can be applied which says that a contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract. It is not necessary for us here to say positively whether the bank assented to this trust or not, although the learned Subordinate Judge finds that it did so assent. What seems clear to us is that the 1st defendant cannot possibly take advantage of section 135 because in this suit he cannot plead that he is a surety. In order to plead that he is a surety at all under the Contract Act, he must come under the definition of that word in section 126 and he must be a party to a contract of guarantee. "A contract of guarantee" the section runs "is a contract to perform the promise, or discharge the liability, of a third person in case of his default." Now it is argued that the real contract here was well known, that no one expected the 1st defendant to borrow any money from the bank and that every one understood that his sole liability was to guarantee the borrowing by Srinivasan. That does not however affect the fact that the contract between the 1st defendant and the bank is expressed in a promissory note, and according to the provisions of section 132 whatever the contract may have been between the 1st defendant and Srinivasan and whatever the knowledge of the bank may have been of that contract the liability of both of them under the promissory note is quite unaffected by that fact.

It was faintly suggested in argument that this promissory note ceased to be a promissory note because the words "security for overdraft" are found printed upon it; but we can see no reason or authority for accepting such an argument. It seems to us that this is a particular kind of precaution which is taken by this bank and not uncommonly by other banks in this country in order to ensure that when a customer of theirs fails to meet his obligations they can proceed against the surety without any possibility of the surety setting up section 135 of the Contract Act against them.

We are of opinion accordingly that the 1st defendant must fail not only upon the facts but also upon his attempt to enlist the sections of the Contract Act in his service and that he cannot in any way escape liability upon Ex. A.

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There is however one small error in the decree which has been brought to our notice. The learned Subordinate Judge has decreed to the plaintiff a sum of Rs. 9,981-1-9 with interest thereon at the rate of eight per cent. per annum from the 17th August, 1938, to the date of the decree. In doing so he has overlooked the fact that the sum of Rs. 9,981-1-9 includes interest calculated up to the date of the plaint and therefore that any interest awardable from the date of plaint to the date of the decree must be only upon the principal sum due. The decree will accordingly be modified by saying "do pay to the plaintiff the sum of Rs. 9,981-1-9 with interest on Rs. 8,500 at the rate of eight per cent. per annum from the 17th August, 1938, to this date."

Except for this slight modification the appeal must fail and is dismissed with costs.

K.C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Veerabahu Pillai (deceased) and others .. *Appellants**
(Respondent—Decree-holder and his L.Rs.)

v.

Kavanna Seena Chittiram Pillai (deceased) and others .. *Respondents*
(Petitioner—Judgment-debtor).

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Civil Procedure Code (V of 1908), Order 23, rule 1—Mortgage suit—Stage between preliminary and final decree—Adjustment of payment out of Court—Whether can be recorded—Pendency of suit after preliminary decree—Limits of rule.

An adjustment or payment out of Court between the preliminary and final decrees in a mortgage suit cannot be gone into by the Court when a petition is filed under Order 23, rule 1, Civil Procedure Code, for recording the adjustment between the parties.

Palaniappa Chettiar v. *Narayanan Chettiar,* (1935) 69 M.L.J. 765: I.L.R. 59 Mad. 188 (F.B.), distinguished.

After the passing of the preliminary decree the suit is pending only for a particular purpose, namely, for the purpose of enforcing the right declared by the preliminary decree in the manner set out in the decree and not for any other purpose. And after the passing of the final decree the suit is pending for ascertaining, if personal remedy is available, whether any money remains due after paying the sale proceeds to the plaintiff or after giving credit to any payment or adjustment made subsequent to the passing of the final decree.

Appeal against the order of the District Court of Tinnevelly, dated 30th March, 1937, and made in A.S. No. 35 of 1937 preferred against the order of the Court of the Subordinate Judge of Tuticorin, dated 14th December, 1936, and made in I.A. No. 166 of 1935 in O.S. No. 6 of 1934.

S. T. Srinivasa Gopalachari for Appellants.

N. Krishnamachari for Respondents.

The Court delivered the following

JUDGMENT.—This Civil Miscellaneous Second Appeal arises out of an application purporting to be filed under Order 23,

*A.A.A.O. No. 178 of 1939. 3rd July, 1942.

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rule 3, and Order 21, rule 2, and section 151 of the Code of Civil Procedure, praying for recording an adjustment between the parties as per agreement, dated 15th January, 1935, and for passing an order in terms thereof.

The appellant was the plaintiff in the suit in which this application was filed and had obtained a preliminary decree for the sale of the hypotheca. The 1st respondent (defendant) filed this application subsequent to the passing of the preliminary decree for recording adjustment. His case was that subsequent to the passing of the *ex parte* preliminary decree there was an agreement between the parties on 15th January, 1935, that Rs. 100 was to be paid then and Rs. 900 a few days later, that for Rs. 1,000 two items of properties were to be conveyed and possession given to the plaintiff and that the balance of Rs. 1,000 was to be paid in six months. On the 13th March, 1935, this application was filed by the 1st respondent alleging that he had paid Rs. 100 on the date of the agreement and Rs. 900 a few days later, that he had also executed the two sale deeds, and handed them over with the keys of the two houses which were to be conveyed to the mediators, and that he was willing to pay the balance of Rs. 1,000 on the due date. The decree-holder objected to any action being taken on the application as it was not a case of adjustment by payment into Court as per the terms of the preliminary decree but an adjustment out of Court, and inasmuch as he was disputing the adjustment as the houses were not in the condition in which they were on 15th January, 1935. His further contention was it was not open to the Court to go into the truth or validity of the adjustment when it is disputed. The Court of first instance as well as the lower appellate Court held that the Court could go into the matter and ordered the petition as prayed for.

In this Court the appellant contends that the lower Courts had no jurisdiction to go into the matter and the petition should have been dismissed. That any adjustment out of Court could not be gone into in answer to a claim for a final decree in pursuance of a preliminary decree when it is disputed is pointed out in a number of rulings of this Court *Singa Raja* v. *Pethu Raja*,[1] *Rasan Chettiar* v. *Rangayam Chettiar*,[2] *Adari Sanyasi* v. *Nookalamma*[3] and *Viswanatha Aiyar* v. *Chimmukutti Amma*.[4] In *Rasan Chettiar* v. *Rangayan Chettiar*,[2] it has been pointed out that the general trend of the decisions under the present Code is that an application for final decree is not a proceeding in execution and therefore Order 21, rule 2, will not apply at all. It is urged however that in spite of the prohibition contained in Order 34 of the Code of Civil Procedure to the Court going into any adjustment or payment out of Court in the matter of passing a final decree in pursuance of the preliminary decree, it is open to a party who pleads such an adjustment to move the Court

1. (1918) 35 M.L.J. 579: I.L.R. 42 Mad. 61.
2. A.I.R. 1930 Mad. 105.
3. (1930) I.L.R. 54 Mad. 708.
4. (1931) 62 M.L.J. 272: I.L.R. 55 Mad. 320.

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under Order 23, rule 3, as the suit has to be considered to be pending till the final decree is passed or till a decree is passed under Order 34, rule 6, in cases where the right to proceed personally against the mortgagor subsists and that consequently the question of adjustment will have to be gone into for recording the adjustment and passing a fresh decree as directed in Order 23, rule 3. As already pointed out above, the trend of the decisions of this Court has throughout been against the right of a party to ask the Court to go into the question of adjustment or payment out of Court in respect of a preliminary decree passed in a suit on a hypothecation debt. It is true that the other High Courts have held that this question can be gone into, vide *Ram Niwas* v. *Ram Dayal*[1] and *V. M. R. P. Chettyar Firm* v. *Hajee Mahomed Sultan*,[2] but no authority of this High Court has been cited in which it has been held that the matter could be gone into. The decision in *Palaniappa Chettiar* v. *Narayanan Chettiar*,[3] referred to by the lower Court and relied on by the respondent has no application to the facts of this case. That was a case of adjustment subsequent to the passing of the final decree and before a petition was filed under Order 34, rule 6. The question as to the factum and validity of an adjustment between a preliminary decree and final decree in suits on hypothecation deeds cannot be gone into because the preliminary decree settles the amount and directs payment in a particular way, namely, by payment into Court. There is no such direction in the final decree. The right to enforce a claim personally as against a mortgagor arises only after the hypotheca is sold in pursuance of the final decree. Therefore any adjustment between the date of the final decree and the date of an application under Order 34, rule 5, cannot be said to be in contravention of the terms of the decree. After the final decree is passed it will be open to a party to pay out of Court and such payment can be recognised by the executing Court. I therefore do not think that the lower Court was justified in relying upon *Palaniappa Chettiar* v. *Narayanan Chettiar*[3] as authority for the position that an adjustment between the preliminary and final decree could be gone into when a petition is filed under Order 23, rule 3. That the provisions of Order 34, rule 4, cannot be overridden by Order 23, rule 3, is pointed out in *Rasan Chettiar* v. *Rangayan Chettiar*,[4] where His Lordship Justice Wallace at the end of his judgment observes:

> "Order 23, rule 3, cannot be read to override the clear terms of Order 34, rules 3 and 4,"

and this is what the other learned Judge, His Lordship Justice Pakenham Walsh, observes:

> "One other argument may be noticed, that Order 23, rule 3, applies and the Court is bound to recognise such adjustment out of Court. But Order 23, rule 3, relates to the satisfaction of a suit, not to the satisfaction of a decree, and to hold that parties can adjust a preliminary decree between themselves out of Court and get such adjustment enforced under Order 23, rule 3, would render the whole scheme of Order 34, rule 3, nuga-

1. A.I.R. 1939 All. 174.
2. A.I.R. 1941 Rang. 316.
3. (1935) 69 M.L.J. 765: I.L.R. 59 Mad. 188 (F.B.).
4. A.I.R. 1930 Mad. 105.

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tory. As stated above this procedure of paying into Court the amount due under the preliminary decree in a mortgage suit for sale was a deliberate restriction of the previous privilege of paying the mortgagee out of Court under the Transfer of Property Act. The orders under the Code must be construed reasonably with reference to each other. I hold that Order 23, rule 3, is not applicable.''

That the suit is pending till a decree is passed under Order 34, rule 6, is not disputed; but after the passing of the preliminary decree the suit is pending only for a particular purpose namely the purpose of enforcing the right declared by the preliminary decree in the manner set out in the decree and not for any other purpose. After the passing of the final decree the suit is pending for ascertaining, if personal remedy is available, whether any money remains due after paying the sale proceeds to the plaintiff or after giving credit to any payment or adjustment made subsequent to the passing of the final decree. The Lahore High Court has gone still further in *Raja Ram* v. *Allahabad Bank, Ltd.,*[1] His Lordship Justice Bhide observes:

"The main contention of the learned Counsel for the appellant was that if the suit remains pending till the final decree, there is no reason why the provisions of Order 23, rule 3, should not apply. But a preliminary decree in a suit for sale is a formal adjudication of the rights of the parties with reference to the mortgage and the decree directs that the plaintiff's claim shall be satisfied by a payment in Court in a certain manner. Any adjustment out of Court would, therefore, be obviously contrary to the terms of the decree. In this aspect of the question, the adjustment out of Court made without its sanction, may, I think, be looked upon as 'unlawful' and therefore inadmissible under Order 23, rule 3, Civil Procedure Code. The terms of a preliminary decree passed according to the provisions of Order 34, rule 4, Civil Procedure Code, as regards payment in Court, etc., are imperative.''

Merely because a suit is pending after the preliminary decree is passed, it does not mean that all the provisions of the Code with regard to pending suits will apply to such suit. In *Lachmi Narain Marwari* v. *Balmakund Marwari,*[2] it was pointed out that after the preliminary decree was passed in a partition suit, the suit cannot be dismissed under Order 17, rule 2.

In these circumstances I think the lower Courts were not justified in going into the question of adjustment and the petition ought to have been dismissed.

In the result the second appeal is allowed and the petition dismissed with costs in all the three Courts.

B. V. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

R. S. Naidu .. *Appellant* (Petitioner)*

v.

Auditor and Examiner of Local Fund Accounts, Madras .. *Respondent (Respondent).*

R.S. Naidu v. Auditor and Examiner of Local Fund Accounts, Madras.

Madras District Municipalities Act (V of 1920), section 69 and Schedule IV, rule 61—Lease of Municipal Farm—Formal contracts of lease

1. I.L.R. (1939) Lah. 313: A.I.R. 1939 Lah. 79 at 80.
2. (1924) 47 M.L.J. 441: L.R. 51 I.A. 321: I.L.R. 4 Pat. 61 (P.C.).

*A.A.O. No. 168 of 1940. 15th July, 1942.

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not taken—Loss caused to Municipality—Order of surcharge against chairman—Negligence not proved—Order of surcharge whether sustainable.

The chairman of a Municipality held an auction and leased out to the highest bidders the sewage farm belonging to the Municipality for a period of two years. As required by the rules the successful bidders signed unstamped muchilikas as soon as their bids were accepted. According to section 69 of the Madras District Municipalities Act it was necessary that subsequently formal written contracts should have been drawn up and executed by the successful bidders and also signed by two Municipal Councillors. These contracts were not however taken in respect of the lease of the sewage farm. Subsequently the lessees committed default in paying the rent and the Municipality filed suits against them based on the contracts entered into by them or in the alternative on the basis of their liability to pay damages for use and occupation of the farm. The suits were originally dismissed for the reason that the contracts could not be proved, the formal documents prescribed by the statute not having been executed by the parties. The cases were taken up in revision to the High Court and they were remanded for trial on the alternative prayer for damages for use and occupation. The suits were thereupon partially decreed. The Examiner of Local Fund Accounts surcharged the chairman of the Municipality for the difference between the amounts decreed and the amounts claimed by way of rent, and also for the stamp duty and penalty paid into Court for proving the unstamped muchilikas. It was proved that an application for refund of the stamp duty paid was preferred to the Board of Revenue long after and that the same was dismissed as barred by limitation. It was also proved that according to the routine of procedure prevailing in the office of the Municipality the manager was responsible for taking the formal contracts from the successful bidders. The chairman contended that he had been relying on the due discharge of duty by the manager and his subordinates in accordance with established office routine in respect of the leases, and that the surcharge order should be set aside.

Held, that the chairman of the Municipal Council could not under the circumstances be said to have acted negligently in the matter of not taking formal contracts for the leases, and that the order of surcharge was not justified either as regards the stamp duty and penalty paid, or as regards the portion of the rent that was lost to the Municipality as a consequence of the formal contracts of lease not having been taken.

In re *National Bank of Wales, Limited,* (1899) 2 Ch. 629 and *Dovey* v. *Cory,* (1901) A.C. 477, referred to.

Appeal against the order of the District Court of Madura, dated 9th day of October, 1939, and made in O.P. No. 42 of 1938.

K. Rajah Aiyar and *T. A. Ramaswami Reddy* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Judgment of the Court was delivered by

Kunhi Raman, J.

Kunhi Raman, J.—This is an appeal from the order of the learned District Judge of Madura in a petition presented under rule 61 of schedule IV of the District Municipalities Act IV of 1920. The prayer in the petition before the lower Court was to set aside a surcharge order made by the Auditor and Examiner of Local Fund Accounts against the appellant who was the chairman of the Madura Municipality from the 2nd July, 1923 to the 10th December, 1930. The surcharge certificate mentions that the Municipality had sustained a loss as the result of negligence on the part of the appellant in the following circumstances. For the years 1929-30 and 1930-31, the Municipal sewage farm in Madura was leased out for cultivation to the highest bidders at an auction conducted by the petitioner. As required by the rules, the successful bidders signed unstamped muchilikas as

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soon as their bids were accepted. According to section 69 of the District Municipalities Act, it was necessary that subsequently formal written contracts should have been drawn up and executed by the successful bidders and also signed by two Municipal Councillors. These contracts were not executed in respect of the auctions which formed the subject-matter of the surcharge certificate. The lessees committed default in paying the rent. Thereupon the Municipality filed suits against them based upon the contracts alleged to have been entered into by them or in the alternative on the basis of their liability to pay damages for use and occupation of the farm. It is stated that originally all the suits were dismissed by the trial Court for the reason that the contracts could not be proved, the formal documents prescribed by the statute not having been executed by the parties concerned. The matter came up here in the form of civil revision petitions and it was held by the High Court in 1935 (C.R.Ps. 1356 to 1381 of 1933) that the suits ought not to have been dismissed *in toto* because of the absence of formal contracts but that the trial Court ought to have considered the alternative prayer for damages for use and occupation of the farm. The suits were accordingly remanded for retrial in the light of these observations and the retrial resulted in decrees being passed for a total sum of Rs. 1,298-1-6. According to the rental agreements relied on in the suits, the total amount payable by the tenants was Rs. 4,263-11-10. It was alleged that for the difference of Rs. 2,965-10-4, the appellant was liable because it represented the loss sustained by the Municipality as a result of his negligence in not having carried out the provisions of the District Municipalities Act and of the terms of the auction by making the successful bidders execute formal contracts on duly stamped paper. At the trial of these suits, a total sum of Rs. 792-8-0 had to be paid by the Madura Municipality towards stamp duty and penalty in respect of the unstamped muchilikas that were relied on for proving the case of tenancy. This is also described as a loss sustained by the Municipality as a result of the negligence of the appellant in not obtaining duly stamped contracts from the parties. These two items make up the total of Rs. 3758-2-4 for which the Local Fund Auditor granted a surcharge certificate. The certificate was issued on the 22nd July, 1938. As already stated, the term of the appellant's tenure of office as Chairman of the Madura Municipality extended from the 2nd July, 1923, to the 10th December, 1930. It will thus be seen that the certificate was issued nearly eight years after the appellant had vacated office as Chairman.

At the hearing of the petition for discharging this certificate, it was found by the learned District Judge that to the extent of Rs. 216-14-3 the appellant has been wrongly surcharged, because that admittedly referred to a lease granted after the appellant had vacated the office of Chairman of the Municipality. In respect of the balance the Court below has refused to interfere. It is from this decision that the present appeal is filed.

It would be convenient to refer first to the item of Rs. 792-8-0 mentioned in the surcharge certificate. As already

stated, this represents the stamp duty and penalty paid by the Municipality at the hearing of the 27 suits for damages for use and occupation filed against the lessees of the sewage farm. It is argued by the learned advocate for the appellant that it was open to the Municipality to have requested the Court at the time that the suits were disposed of to include these amounts in the decrees against the defendants under section 44 (3) of the Indian Stamp Act. It is also argued that it appears from the records that a petition for refund of this amount was presented by the Municipality to the Board of Revenue after the appellant had vacated office and that this petition was dismissed on the ground that it was belated and the right had become barred by limitation. The appellant's advocate argues with considerable force that since this application was made after the expiry of a year from the date of payment and it was rejected for that reason on the ground of limitation, it is not open to the Municipality to claim the amount from the appellant. Even granting that this item comes under the category of damages sustained by the Municipality as a result of the negligence of the appellant, it was incumbent upon the Municipality to have done everything to mitigate the damages. That this was not done is clear from the conduct of the Municipality in not applying in time for refund of this amount. The Court below seems to have proceeded on the basis that there was no guarantee that the Board would have granted a remission of this amount even if the petition was filed in time. In our opinion this is not quite the right method of approaching this question. There is nothing in the order made by the Board of Revenue to indicate that there were any reasons other than that of limitation which induced the Board to reject the application. Again it does not appear from the record that there was any endeavour made at the time the suits were disposed of to see that the amounts of the stamp duty and penalty were included in the decree and imposed as a liability upon the lessees concerned. Even otherwise it seems to us that this item is too remote a consequence of the petitioner's conduct to warrant the view that he is responsible for it. For these reasons we are of opinion that the appellant is in any event not liable for this part of the claim.

Coming now to the main item which forms the subject-matter of this appeal, it must be stated at the outset that no case of misconduct has been made out against the appellant. The question is whether he has been guilty of negligence. The attitude of the appellant in the Court below was that he had discharged the duty that was directly imposed on him with regard to the leases of the sewage farm which were granted by him after the auctions. According to the rules, as soon as the highest bid at the auction was accepted by the appellant who was the proper officer to hold the auctions, he had to take muchilikas from the successful bidders and sign those documents himself. This he had done. It is specifically alleged in the verified petition filed by him in the Court below and also in his evidence that according to the routine or rule of precedure prevailing in the office of the Municipality the manager is responsible for the next step in

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the progress of events which was to obtain the value of the proper stamp to be affixed to a formal contract from each of the successful bidders and get that formal contract signed by each of the bidders and also by two Municipal councillors on behalf of the Municipality. It is significant that at this stage the Chairman has no direct duty to discharge except perhaps the general duty imposed upon him to be responsible for the management of the Municipal Office. Out of a number of contracts that were entered into as a result of auctions conducted by the appellant, the total amount of the value of which exceeded Rs. 20,000 only the contracts which formed the subject-matter of the surcharge certificate the total value of which is Rs. 4,263-11-10 were not formally entered into as required by the rules. As already stated the appellant had made a specific point that he was relying on office routine and that he was relying on the manager carrying out the office routine in respect of the subsequent stages relating to the contracts involved in the present appeal. There was no evidence *contra* and there was not even a denial of the statement made by him. Considering the small amount involved in the present litigation as compared with the total amount of income derived by the Municipality at the time the appellant was doing duty as chairman it is, in our opinion, not unreasonable to accept the explanation given by the appellant that he was relying upon the due discharge of duty by the manager and his subordinates in accordance with established official routine, in respect of the contracts which are referred to in the surcharge certificate. Such confidence in the due discharge of the duties reposed *bona fide* in the manager and his establishment cannot, in our view, be regarded in the circumstances of the present case as amounting to negligence which would warrant the issue of a surcharge certificate. The position of a chairman like the appellant is, in our opinion, not entirely dissimilar to that of a paid director of a bank who is sought to be made personally liable for loss caused to the bank by alleged misconduct or negligence. In dealing with such a case the Court of Appeal said in In re *National Bank of Wales, Limited*,[1] as follows:

" . . . . Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them as well as by those below them until there is reason to distrust them. We agree that care and prudence do not involve distrust; but for a director acting honestly himself to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest businessmen''. ..

The view was affirmed by the House of Lords in *Dovey* v. *Cory*,[2] The Earl of Halsbury, then L.C., in his speech says as follows:

''The charge of neglect appears to rest on the assertion that Mr. Cory like the other Directors did not attend to any details of business not brought before them by the General Manager or the Chairman and the argument raises a serious question as to the responsibility of all persons holding positions like that of Directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed, by their subordinates of every degree. It is obvious, if there is

1. L.R. (1899) 2 Ch. 629.
2. L.R. (1901) A.C. 477.

such a duty, it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, Managing Director, a Chairman and find out whether auditors, Managing Directors and Chairmen were all alike deceiving him."

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In the present case it will be seen that there was no fraud practised by the office Manager. At the most it was only a case of negligence on the part of the office Manager which escaped undetected by the appellant. Omission to detect it in the present case in which the evidence shows that the appellant trusted the manager of the office to do his duty, does not amount to culpable negligence on the appellant's part seeing that he had no reason to doubt that the manager would fail to do his duty. It is significant that in the present case even the amounts that were decreed against the lessees have been written off by the Municipal Council for reasons best known to themselves. Can it then be said that had the lessees been compelled to execute formal leases on duly stamped paper, the Municipality would not have sustained any loss? It may be that on the strength of such formal documents decrees for higher amounts might have been obtained. But when the judgment debtors were not in a position to pay even the lesser amounts decreed against them and even those amounts were written off by the Municipal Council, it will, to say the least, be highly technical to say that the Municipality had sustained a loss to the extent of the difference between the amount decreed and the extent to which they might have obtained decrees had formal contracts been taken from the lessees. For all these reasons we are of the view that there was no warrant for the issue of a surcharge certificate in the present case. The order of the Court below must therefore be reversed and the surcharge certificate ordered to be set aside. We do not however consider that this is a proper case in which the appellant should be given his costs of this appeal. The parties shall bear their own costs.

B. V. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

N. P. Esappa Chettiar .. *Petitioner* (Accused)*

Esappa Chettiar, *In re.*

Madras Local Boards Act (XIV of 1920), sections 157 and 223—Specific Relief Act (I of 1877), section 56 (e)—Special officer restraining petitioner from constructing a well on a public road—Complaint filed—Suit by accused in Munsiff's Court and injunction obtained against special officer from proceeding with criminal case—Civil Court's rights to grant injunction.

A special officer of a Panchayat Board acting under section 157 of the Local Boards Act filed a complaint against the petitioner for constructing a well and a structure on a public road. The petitioner thereupon filed a suit for establishing his right to the property and applied for an injunction to restrain the special officer from proceeding with the prosecution of the criminal case. The injunction was granted. But as the District Magistrate felt he could proceed with the case under section 223 of the Local Boards Act the Public Prosecutor intervened and sought to continue the prosecution on behalf of the Government. On revision,

Held, that the order of the Civil Court was improper in view of the provisions of section 56 (*e*) of the Specific Relief Act. The Civil Court could not stay the criminal proceeding directly. Even if the Court had

*Crl. R. C. No. 272 of 1942. 27th August, 1942.
(Crl. R. P. No. 258 of 1942.)

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the power of staying the proceeding, it ought not to have exercised it in this case and interfered with the course of justice in another Court.

The fact that the special officer had not done anything to have the order of the Civil Court set aside did not however mean that the Magistrate could not proceed with the trial. All that the special officer had been ordered with regard to the criminal case was that he should not further prosecute it. That would mean that he might not himself take any active steps in the further prosecution of the matter. That did not prevent him from appearing and giving evidence if he was so ordered by the Magistrate. But the order of the District Magistrate in continuing the proceeding in this case by permitting the Government to proceed with the prosecution was wrong as the Magistrate did not take cognisance of the offence upon information received or upon his knowledge or suspicion.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Taluk Magistrate of Sivaganga, dated 27th March, 1942 and passed in C. C. No. 843 of 1941.

V. T. Rangaswami Aiyangar for Petitioner.

K. Venkataraghavachariar for the Public Prosecutor for the Crown.

The Court made the following

ORDER.—The special officer of the Panchayat Board of Nattarasankottai filed a complaint against the petitioner under section 157 of the Local Boards Act of erecting a wall and structure on the public road. The petitioner thereupon filed a civil suit in the Local District Munsiff's Court for establishing his right to the property and praying for an injunction restraining the defendant Board from interfering with his rights. At the same time he filed an application for a temporary injunction restraining the special officer from proceeding with the prosecution of the criminal case. The District Munsiff granted the injunction prayed for; and so both the special officer and the Criminal Court felt that the criminal case could not be proceeded with. As it however seemed to the District Magistrate that he might proceed with the case under section 223 of the Local Boards Act, the Public Prosecutor intervened and sought to continue the prosecution on behalf of the Government. The petitioner has filed the present petition in this Court to revise the order of the Magistrate.

I have no doubt that the petitioner is right in saying that the Government cannot proceed with this prosecution. Under the Local Boards Act, public roads within the local board area are vested in the Local Board and section 223 makes it clear that except under certain circumstances a criminal case can be launched only upon the complaint of the President of the Local Board or by some person specially authorised in this behalf. The sentence "Nothing herein shall affect the provisions of the Code of Criminal Procedure in regard to the power of certain Magistrates to take cognizance of offences upon information received or upon their own knowledge or suspicion" does not in this case give the Government power to proceed with the prosecution. The Magistrate did not take cognizance of the offence upon information received or upon his own knowledge or suspicion, but upon the written complaint of the Special Officer of the Panchayat Board. Government may be the ultimate owner of the land over which the road passes; but that does not give them the right to prosecute

Esappa Chettiar. *In re.*

under the Local Boards Act, although they may have remedies under the Land Encroachment Act or other enactment.

I think it necessary to say a few words about the very improper order of the District Munsiff. In the first place, I think that the learned District Munsiff had no authority to pass such an order, in view of the provisions of section 56 (*e*) of the Specific Relief Act. He could not stay the criminal proceeding directly; so he attempted to do it by preventing the proceedings from continuing by issuing an injunction to the defendant Board. But even if the District Munsiff had jurisdiction to stay a prosecution in this way, he ought not to have exercised it in this case and interfered with the course of justice in another Court. Even in the case quoted by the learned District Munsiff, it is pointed out that only in extreme cases should a Court interfere with the proceedings of a local body or restrain its officers from doing their duty. The District Munsiff moreover had no material on which he could conclude that the Special Officer had no right to prosecute. If the petitioner was aggrieved he was not without his remedy and could, as others do in similar circumstances, seek the assistance of the Criminal Courts superior to that of the Magistrate trying.

The Special Officer unfortunately did not endeavour to get the improper order of the District Munsiff set aside by appealing to a higher tribunal, and so the special officer cannot disobey the injunction of the District Munsiff. That does not however mean that the Magistrate cannot proceed with the trial. If he issues a summons to the special officer to give evidence in the case the Special Officer cannot disobey that summons. All that the Special Officer has been ordered with regard to the criminal case is not to further prosecute it. That would mean that he may not himself take any active steps in the further prosecution of this case. That does not prevent him from appearing and giving evidence if he is so ordered by the Magistrate.

It is said that the special officer at a subsequent hearing did not appear and that therefore the accused should have been acquitted. Under section 247, Criminal Procedure Code, it is open to the Magistrate to acquit the accused if the complainant does not appear on the date of hearing, unless for some reason he thinks proper to adjourn the hearing of the case to some other day, provided that where the complainant is a public servant—as in this case—and his personal attendance is not required the Magistrate may dispense with his attendance and proceed with the case.

With the above remarks the petition is allowed and the order of the Magistrate permitting the Government to proceed with the prosecution is set aside.

K.C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Palaniandi Muthirian and others .. *Petitioners** (*Accused*)

v.

Ramaswami Reddi .. *Respondent* (*Complainant*).

Palaniandi Muthirian *v.* Ramaswami Reddi.

Indian Penal Code (XLV of 1860), sections 425 and 379—Cattle grazing crops on land—Complaint for destruction of property—Question, whether

*Crl. R. C. No. 331 of 1942. 2nd September, 1942.
(Crl. R. P. No. 321 of 1942.)

Palaniandi Muthirian v Ramaswami Reddi.

grazing amounted to destruction of property or theft—The gravamen of charge same—Conviction under any section may be justified.

Construing section 425, Penal Code strictly there can be no doubt that in allowing one's cattle to graze on land belonging to the complainant, there is destruction of property within the meaning of the section.

The question whether the offence was one of destruction of property under section 425 or theft under section 379 is, however, rather academic; for the Court could change the conviction from section 425 to section 379 of the Penal Code, the ingredients of the charge being properly set out and the evidence being the same; for the gravamen of the offence was that the cattle grazed the crop belonging to the complainant.

Gurram Siddagadu, In re, (1886) 1 Weir. 492, approved.

Observations in *Raghupathi Aiyar* v. *Narayana Goundan,* (1928) 55 M.L.J. 767: I.L.R. 52 Mad. 151, considered.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional First Class Magistrate, Namakkal, dated 5th February, 1942 and passed in C.A. No. 3 of 1942, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Namakkal in C.C. No. 1852 of 1941.

V. T. Rangaswami Aiyangar for Petitioner.

A. S. Sivakaminathan for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioners were convicted under section 426 of the Indian Penal Code for sending their cattle to graze on the bund of a tank belonging to the complainant, and the convictions were confirmed in appeal.

In a somewhat similar case that came before Curgenven, J., in *Raghupathi Aiyar* v. *Narayana Goundan*[1] the learned Judge expressed the opinion that,

> "destruction of any property within the meaning of section 425, Indian Penal Code, carried with it the implication that something should be done to the property contrary to its natural use and serviceableness."

He added by way of illustration:

> "It may be mischief to throw the contents of a pot of food upon the fire; but it is not mischief, though it may be theft, to eat the food."

He applied the illustration to the case before him and said,

> "And so, here, since the graziers, by allowing their goats to graze, did no more than put the grass to its normal use, by the same reasoning their act would not amount to mischief, though it may have amounted to theft."

With due respect I quite appreciate the arguments of the learned Judge in that case; but in another similar case considered by a Bench of this Court in *Gurram Siddagadu,* in re,[2] Kernan, J., said,

> "There appears to be no doubt that defendants grazed the cattle in order to derive the benefit of the grazing on the Government property, *viz.*, the grass, and it appears to be equally clear that the consumption of the grass caused the destruction of it, so far as the Government's right was concerned."

The other Judge, Brandt, J., adopted the same reasoning. If one construes section 425, strictly, there can be no doubt that property was destroyed by the grazing of the cattle, although it may be thought, as Curgenven, J., did, that the Legislature could not have intended to speak of destruction if a thing were destroyed in the

1. (1928) 55 M.L.J. 767: I.L.R. 52 Mad. 151.
2. (1886) 1 Weir. 492.

Palaniandi Muthirian v. Ramaswami Reddi.

way that nature intended it to be destroyed, such as food or grass by eating. Curgenven, J., sought to distinguish *Gurram Siddagadu*, in re;[1] but I find myself unable to do so.

The question is however rather academic; for this Court could change the conviction from section 426 of the Indian Penal Code to section 379 of the Indian Penal Code. The ingredients of the charge were properly set out; and the evidence would be the same whether the charge were under section 379 of the Indian Penal Code or section 426 of the Indian Penal Code; for the gravamen of the offence was that cattle grazed the crop belonging to the mittadar, the complainant.

The petitioners have been punished with a petty fine of Rs. 10 each. No interference is called for in revision.

K.C. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

V. A. Gayasudeen .. *Petitioner** (*Accused*).

Gayasudeen, *In re.*

Madras Prohibition Act (X of 1937), section 3 (17)—"Spirits"—If means only potable spirits—Spirits mixed with shellac—Introduction into prohibition area—Offence.

The term "spirits" is defined in section 3 (17) of the Madras Prohibition Act as meaning any liquor containing alcohol and obtained by distillation (whether it is denatured or not). There is nothing in the Act which suggests that because some substance (*e.g.* shellac) is mixed with the spirit that makes it unfit for human consumption it is no longer "spirits". On the contrary, the very wording of section 3 (17), indicates that spirits which are not potable come within the definition of spirits. Even if the transport of such spirits is for industrial purposes a licence is required under section 18 of the Act.

The Attorney-General v. *Bailey*, (1847) 1 Exchequer Rep. 281, distinguished.

Accordingly where the accused despatched from the Madras Central Station two drums which on examination on suspicion by the Police at Melpatti Station were found to contain denatured spirit with some solid matter which the analyst thought might have been shellac, he is guilty of an offence under section 4 (1) (*a*) of the Madras Prohibition Act.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment, dated 26th May, 1942, of the Special Honorary Presidency Magistrate of the Court of the Presidency Magistrates G. T., Madras in C. C. No. 307 of 1942.

S. Narayana Aiyangar for Petitioner.

C. D. Venkataraman for the Crown Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—The petitioner despatched from the Madras Central Station two drums, the contents of which he described as wood oil. A railway constable became suspicious and examined the drums at Melpatti Station. He then found that they contained denatured spirit with some solid matter in it, which was found, after the distillation of the spirit, to contain a substance which the analyst thought might have been shellac. The petitioner says that these ten gallons of denatured spirit contained a viss of shellac and a viss of

1. (1886) 1 Weir. 492.

*Crl.R.C. No. 335 of 1942. (Crl.R.P. No. 325 of 1942.) 10th August, 1942.

Gayasudeen, *In re.*

resin. There is no reason to doubt the truth of that statement; and so we may for the purpose of this petition assume that statement to be true. The petitioner was charged under section 4 (1) (*a*) of the Madras Prohibition Act for the illicit transport of ten gallons of denatured spirit and was convicted. He was also charged under section 417 of the Indian Penal Code with making a false declaration that the drums contained wood oil; but of this offence he was found to be not guilty.

It is argued that the petitioner was entitled to transport spirits in which shellac and resin had been dissolved; because the dissolving of these substances rendered the liquid not potable and therefore not liquor or spirits within the meaning of the Act. 'Liquor' is defined in section 3 (9) as including toddy, spirits of wine, methylated spirits, spirits, wine, beer, and all liquid consisting of or containing alcohol. 'Spirits' is defined in sub-section (17) of the same section as meaning any liquor containing alcohol and obtained by distillation (whether it is denatured or not). There is nothing in the Act which suggests that because some substance is mixed with the spirits that makes it unfit for human consumption it is no longer 'spirits'. On the contrary, the very wording of sub-section (17) of section 3 indicates that spirits which are not potable come within the definition of 'spirits'; for they include denatured spirits; and 'denatured' is defined in the explanation to that sub-section as meaning 'subjected to a process prescribed by the Provincial Government by notification for the purpose of rendering unfit for human consumption'.

The evidence does suggest that varnishes such as French Polish can be introduced into prohibition areas without a license; and at least one of the prohibition Sub-Inspectors, D.W. 4, seems to be of opinion that it is unobjectionable. The learned advocate for the petitioner argues that a perusal of the preamble to the Act indicates that Government did not intend to prohibit the transport of spirits and such substances for industrial purposes. That is no doubt true; but under section 18 of the Act a license is required for such transport. If licences were not required, the whole object of the Act might be largely frustrated by mixing substances with spirit which could afterwards be removed by distillation, thus introducing the product without question into prohibition areas, and finally making potable spirits by distillation.

The petitioner quotes *The Attorney-General* v. *Bailey*,[1] in which it was held that spirits within the meaning of a certain English Act meant potable spirits, but in that Act the word 'spirits' was not defined; and so the learned Judges naturally argued that the Legislature must have intended the word 'spirits' to be used in the manner in which it is used in ordinary parlance. They were strengthened in that belief by reference to certain other Acts. That decision cannot however help us in interpreting an Act in which the term 'spirits' is defined as including spirits which are rendered unfit for human consumption.

If the petitioner had merely sent spirits under a widely-held belief that he was entitled to do so without taking out a license,

1. (1847) 1 Exch. Rep. 281.

nothing more than a nominal fine would be called for; but the accused here practised deception. He was not perhaps guilty of an offence punishable under section 417, Indian Penal Code, because it does not seem that on account of his false representation the booking clerk was led to do any act which he would not have done had the petitioner declared the contents of the drums to be varnish; but I have little doubt in my mind that the contents of the drums were described as wood-oil in order to hide the fact that he was sending a substance containing spirits. Wood-oil is oil extracted from various trees and does not resemble in any way any varnish made from spirits. I am not therefore able to treat this offence as a nominal one committed in good faith in the belief that he was doing something which he was entitled to do.

The petition is dismissed.

K.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kamakshi Naidu .. *Petitioner* (Accused).*

Evidence Act (I of 1872), sections 25 and 27—Confession by accused as to criminal breach of trust outside the one for which he was under arrest —Admissibility.

Section 25 to which section 27 of the Evidence Act is a proviso applies equally to confessions with regard to offences not under investigation as with regard to offences under investigation. Where a person while under custody for a criminal breach of trust in respect of a cycle that he had taken on hire and then sold, confessed that he had similarly sold another cycle and as a result of that confession that cycle was discovered, the confession is admissible under section 27 of the Evidence Act.

In re *Seshapani,* I.L.R. 1937 Mad. 358: (1937) 1 M.L.J. 154 and In re *Kodangi,* (1931) 61 M.L.J. 860, referred to.

Petition under sections 435 and 439 and 561-A of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the City First Class Magistrate, Madura, dated 7th May, 1942 and passed in C.A. No. 39 of 1942 preferred against the judgment of the Court of the Sub-Magistrate of Madura Town in C. C. No. 81 of 1942.

N. S. Mani for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The petitioner was found guilty of committing a criminal breach of trust with regard to a cycle that he had hired. There was evidence that he had borrowed the cycle and that he had sold it to some other person. There was also evidence of a confession. The question that arises in this petition is whether that confession was admissible.

The petitioner was arrested in connection with another criminal breach of trust in respect of a cycle that he had also taken on hire and then sold. While in custody for that breach of trust, he confessed that he had sold another cycle to P.W. 12. As a result of that confession the cycle was discovered. It is argued that such

*Crl.R.C. No. 316 of 1942. (Crl.R.P. No. 307 of 1942.) 11th August, 1942.

Kamakshi Naidu, *In re.*

a confession is not admissible, because he was under arrest, not in connection with the theft of the cycle that was discovered as a result of the confession, but in connection with another case. I do not think that there is any substance in this point. Section 27 of the Evidence Act says that when any fact is deposed to as discovered in consequence of information received from a person accused of *any offence,* in the custody of a Police Officer, so much of such information * * * * may be proved. He was in police custody and he was accused of an offence. So on the plain words of the section this confession was admissible, because the cycle was discovered as a result of the confession. The cases relied on by the learned advocate for the petitioner (In re, *Seshapani*[1] and In re *Kodangi*[2]) although they have very little application to this case, are rather against the petitioner's contention than for it; for they indicate that section 25, to which section 27 is a proviso, applies equally to confessions with regard to offences not under investigation as with regard to offences under investigation.

The learned advocate for the petitioner urges that as the accused is a young man, section 562, Criminal Procedure Code might have been applied to this case. It is true that it might have been applied; but the learned Magistrate who considered the matter thought that an order under section 562 was inappropriate. I am not prepared to interfere with his discretion on the question of sentence.

The petition is dismissed.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

G. N. Chakrapany Chetty & Sons by its managing member G. N. Chakrapany Chettiar .. *Petitioner.**

Chakrapany Chettiar, *In re.*

Opium Act (I of 1878), section 11—Car possessed under hire purchase agreement used for transporting contraband opium and ganja—Confiscation of car—When proper.

Where a car in the possession of the accused under a hire purchase agreement was used by him for transporting large quantities of contraband opium and ganja, and the owner had received only one instalment towards the purchase of the car and had no reason to suspect that the car was being used for transporting opium it would be very hard on the owner to have the car confiscated. A conveyance ought not to be confiscated unless the owner knew or had reason to believe that his vehicle was likely to be used for such purpose. The discretion of the Magistrate to confiscate a vehicle cannot be questioned in a Civil Court but only by the Courts having appellate or revisional jurisdiction over the Magistrate.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Stationary Sub-Magistrate of Pattukottai, dated 27th June, 1942 and made in C. C. No. 155 of 1942.

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

1. I.L.R. 1937 Mad. 358: (1937) 1 M.L.J. 154.
2. (1931) 61 M.L.J. 860.

*Crl.R.C. No. 508 of 1942. 19th August, 1942.
(Crl.R.P. No. 487 of 1942.)

Chakrapany Chettiar, *In re.*

The Court made the following

ORDER.—The petitioner entered into a hire-purchase agreement with the accused, who used a car for transporting large quantities of contraband opium and ganja. The Magistrate confiscated not only the drugs found in the car but the car itself. The petitioner objected; but his objections were overruled with the remark that it was open to Messrs. Chakrapani Chetty and Sons (Petitioner) to seek his remedy under the hire-purchase agreement in a Civil Court.

I doubt very much whether Messrs. Chakrapani Chetty and Sons would have any remedy against the Government in a Civil Court under their hire-purchase agreement. The Magistrate has a discretion under section 11 of the Opium Act to confiscate any conveyance used in carrying contraband opium; and I do not think that the exercise of that discretion could be called in question in a Civil Court. That could be done only by the Courts which have appellate or revisionary jurisdiction over the Magistrate. If the petitioner's case is true that he had received only one instalment towards the purchase of the car and had no reason at all to suspect that his car was being used for transporting opium it would be, I think, very hard on the petitioner to have his car confiscated. In similar cases it has been held that a conveyance ought not to be confiscated unless the owner knew or had reason to believe that his vehicle was likely to be used for such a purpose. That seems to be a very fair test for the Magistrate to apply when he has to consider whether or not he should order the confiscation of the vehicle. As the Magistrate has not considered this, I think his order should be set aside.

The petition is therefore allowed, the order of confiscation of the petitioner's car set aside, and the Magistrate ordered to consider afresh the question whether the car should be confiscated. He should permit evidence to be let in by the prosecution and by the petitioner.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

J. A. Subba Rao .. *Petitioner** (*Petitioner*)

v.

Vommena Seshayya .. *Respondent* (*Respondent*).

Subba Rao *v.* Vommena Seshayya.

Madras Agriculturists' Relief Act (IV of 1938)—Rules framed under G. O. No. 2634 (Development), dated 27th October, 1939—Rule 2—Application by debtor for declaration of amount of debt having regard to the provisions of Act IV of 1938—Averment in the application that debt was barred by limitation—Proper procedure.

Whatever may be the position, when a debtor is seeking to resist an application by the creditor under the rules framed under Madras Act IV of 1938, he cannot ask the Court for a declaration under the rules, of the amount of the debt unless he concedes that there is a debt upon which the provisions of Act IV can operate. Though under sub-rule (2) of rule 2 the Court may inquire into a petition in which the debtor asserts that the debt has been discharged by the provisions of Act IV of 1938, itself, there

*C.R.P. No. 1422 of 1941. 27th July, 1942.

Subba Rao v. Vommena Seshayya.

is no occasion for the Court under the rules to go into a claim by the debtor to scale down a debt which has been discharged in full or has become unenforceable by the operation of some other law than Act IV (for instance the law of limitation) for to do so would be to give an adjudication on hypothetical facts.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of Nellore, dated 10th February, 1941 and O. P. No. 76 of 1940.

K. Umamaheswaram for Petitioner.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The petitioner was the mortgagor under a mortgage of 1924, whereby he borrowed Rs. 11,000. He filed an application before the learned District Judge of Nellore under the rules framed under G. O. No. 2634, Development, dated 27th October, 1939, praying for a declaration of the amount of the debt having regard to the provisions of Madras Act IV of 1938. His application contained two main averments. One was that on applying the provisions of Madras Act IV of 1938, nothing would be found due to the creditor and the other was a plea that having regard to the nature of the payments relied upon to save limitation, the debt was time barred. The learned District Judge declined to go into the question of the amount of the debt unless the petitioner withdrew the averment that the debt was barred by limitation. The learned Judge states:

"As I read rule 2, it is only a person who admits that a debt is due from him who can apply for a declaration of the amount of the debt due by him. He cannot in the same breath say that no debt is due from him at all whether on grounds of limitation or other grounds outside the scope of Act IV of 1938."

It seems to us that this view is correct. Whatever may be the position, when a debtor is seeking to resist an application by the creditor under the rules, he cannot in our opinion ask the Court for a declaration under the rules, unless he concedes that there is a debt upon which the provisions of Act IV of 1938 can operate. No doubt sub-rule (2) of rule 2 expressly provides that the Court may inquire into a petition in which the debtor asserts that the debt has been discharged by virtue of the provisions of the Act. But there seems to be no occasion for the Court under the rules to go into a claim by the debtor to scale down a debt which has been discharged in full or has become unenforceable by the operation of some other law than Act IV, for to do so would be to give an adjudication on hypothetical facts. Rule 7 gives the Court a very wide discretion to take such evidence or make such inquiry as it may consider necessary and to pass such order as it thinks fit. The Court in this case having refused to adjudicate upon the amount of the debt which according to the applicant was unenforceable, it certainly cannot be held that the Court acted without jurisdiction in so refusing or that it improperly declined to exercise a jurisdiction which it had. The petition is therefore dismissed with costs.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kota Appalakonda and others .. *Petitioners** (*Accused*).

Appalakonda, *In re.*

Criminal Procedure Code (V of 1898), section 496—Charge-sheet for bailable offences—Bail granted with condition—Validity.

The accused who were charge-sheeted by the police under sections 147, 148, 447, 324 and 323, Indian Penal Code, applied for bail and the Magistrate granted bail under section 496, Criminal Procedure Code, subject to a condition that "they will not enter on the disputed land till the disposal of the case".

Held, that as the offences with which the accused were charged were bailable offences with regard to which the Magistrate had no discretion in the matter of granting bail, the extraneous condition imposed by the Magistrate in granting bail was not authorised by law, and should therefore be deleted.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Joint Magistrate, Narasapatam, dated 26th June, 1942 and made in C.C. No. 35 of 1942.

E. Venkatesam for Petitioners.

K. Venkataraghavachariar for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioners were charge-sheeted by the police under sections 147, 148, 447, 324 and 323, Indian Penal Code. They applied for bail and the Magistrate granted bail under section 496 subject to a condition in these words,

"accused will be released on a bond of Rs. 250 with two sureties for like sums and on condition that they will not enter on the disputed land till disposal of the case."

The question that arises in this petition is whether this condition is one permissible by law.

With regard to non-bailable offences, I can see no objection to imposing conditions of this kind; for the Magistrate has an option to grant bail or to refuse bail and he has also the power under section 497 (5) of the Criminal Procedure Code of causing persons so released to be arrested and committed to custody, which sub-section he would apply in case the condition was not fulfilled. But all the offences with which the petitioners were charged are bailable offences, with regard to which a Magistrate has no discretion. He must release the accused on bail provided that he is willing to execute bonds for his appearance. If he imposes an extraneous condition such as the Sub-Divisional Magistrate has in this case done, then it would mean that if the condition were not fulfilled he would have to refuse bail; and that he is not permitted to do under section 496 of the Criminal Procedure Code if bonds are furnished for the accused's appearance. So the imposing of a condition of this kind in a bail order leads to the infringement of the provisions of section 496 of the Criminal Procedure Code in case the condition was not fulfilled.

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*Crl. R. C. No. 398 of 1942 31st August, 1942.
(Crl. R. P. No. 386 of 1942).

Appalakonda, *In re.*

As the order of the Magistrate is not one authorised by law, it is modified by deleting the condition that the accused should not enter the disputed land till the disposal of the case.

B.V.V. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Bola Achanna Kamthi .. *Petitioner** (*Complainant*).

Achanna Kamthi, *In re.*

Criminal Trial—Complaint for offence triable under warrant procedure—Complainant absent on day fixed for return of notice—Dismissal of complaint—Fresh complaint—Sustainability.

The petitioner filed a complaint before the Sub-Magistrate charging the accused with certain offences for which the accused could be tried only under the warrant procedure. Notice was ordered to the accused and the case was posted to a certain date for the appearance of the accused. On that day the petitioner was absent and the Magistrate exercised his jurisdiction under section 259, Criminal Procedure Code, and discharged the accused. The petitioner thereupon filed another complaint but the Magistrate refused to accept the same, one of the reasons given being that it would be tantamount to a review application, which the Magistrate had no jurisdiction to grant,

Held, in revision, that the Magistrate was bound to entertain the second complaint as the accused had only been discharged and the previous complaint had not been disposed of on the merits.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Stationary Sub-Magistrate, Karkal, South Kanara, dated the 28th January, 1942, and made in C.C. No. 11 of 1942.

K. P. Bhat for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner filed a complaint before the Stationary Sub-Magistrate of Karkal, charging the accused with certain offences for which the accused could be tried only under the warrant procedure. Notice was ordered to the accused, and the case was posted to a certain date for the appearance of the accused. On that day, the petitioner was absent, and so the Magistrate exercised his jurisdiction under section 259 of the Criminal Procedure Code and discharged the accused. The petitioner thereupon filed another complaint which the Magistrate refused to accept for two reasons; one was that the complainant appeared at 5 P.M., which was after the hour at which papers are received in Court, and the other was that an application to receive a complaint was tantamount to a review application, which the Magistrate had no jurisdiction to grant.

As the accused was only discharged, there was nothing to prevent the complainant from filing a fresh complaint; and if he does so, the complaint must be disposed of in the same way as a first complaint. If the Magistrate has already considered the matter on its merits, he would ordinarily dismiss the second

*Crl.R.C. No. 358 of 1942 (Crl.R.P. No. 348 of 1942). 2nd September, 1942.

Achanna Kamthi, *In re.*

application, but he cannot refuse to consider it on its merits if he has not already done so. The Stationary Magistrate had therefore jurisdiction to entertain the petitioner's second complaint and he should have done so.

The matter went in revision to the District Magistrate, who seemed to think that the Sub-Magistrate disposed of the second complaint on its merits, but it is pretty clear from the Magistrate's order that he did not.

As there is no restriction on the number of complaints that the petitioner may file, it is not necessary for me to set aside the previous orders and direct the Stationary Sub-Magistrate to entertain the second complaint. The petitioner is at liberty to file a third complaint if he so wishes; and the Magistrate must then dispose of it according to law.

B.V.V. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Hariappa Patla .. *Petitioner** (*Accused*).

Hariappa Patla, *In re.*

Madras Local Boards Act (XIV of 1920), section 193 and Sch. VII—Selling of firewood or hay without license—If offence.

Schedule VII of the Local Boards Act, unlike Sch. V of the District Municipalities Act and Sch. VI of the City Municipalities Act, does not include either firewood or hay [*Venkatachala Aiyar* v. *Emperor,* 1941 M.W.N. (Crl.) 100]. Nor can these articles be brought under clause (*n*) of Sch. VII, as 'combustible material'. The latter expression should be confined only to things that burn spontaneously or with great readiness like explosives.

Accordingly the selling of firewood and hay without license are not offences under section 193 of the Local Boards Act.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgments of the Court of the First Class Bench of Magistrates of Udipi, dated the 9th September, 1941, and passed in S. C. Nos. 393 and 395 of 1941.

K. Y. Adiga for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been convicted of two offences by the Bench Magistrates of Udipi, one for selling firewood without a license and the other for selling hay without a license. He was sentenced to pay a fine of eight annas in the one case and four annas in the other. The petitioner seeks to have his conviction and sentence set aside in revision on the ground that it is no offence to sell firewood or hay without license.

Section 193 of the Local Boards Act makes punishable the selling or storing without license of articles mentioned in Schedule VII of the Act. Schedule VII of the Act does not however include either firewood or hay. In this respect it differs from Schedule V of the District Municipalities Act and

*Crl.R.C. Nos. 1012 and 1013 of 1941. 5th March, 1942.
(Crl.R.P. Nos. 955 and 956 of 1941).

Hariappa Patla, In re.

Schedule VI of the City Municipalities Act. This was pointed out by me in *Venkatachala Aiyar* v. *Emperor*.[1]

It is suggested by the learned Public Prosecutor that although firewood and hay are not specifically mentioned in Schedule VII they might be classed as combustibles and thereby fall under clause (*n*) "storing any explosive or combustible material". "Combustible" means something capable of or used for burning. Most things are combustible if sufficient heat is applied; but the association in clause (*n*) of combustible materials with explosives suggests that the legislature did not intend to give the expression "combustible material" a very wide meaning; but to confine it to things that burn spontaneously or with great readiness. This conclusion is confirmed by the fact that in the District Municipalities Act timber and hay are expressly provided for despite the fact that explosives and combustible materials are also mentioned under another heading.

The selling of firewood and hay without licenses are not therefore offences. The convictions are set aside and the fines are ordered to be refunded.

K. S. ——— *Convictions set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Krishna Reddi .. *Petitioner** (*Complainant*).

v.

Muniappa Reddi and others .. *Respondents* (*Accused*).

Krishna Reddi v. Muniappa Reddi.

Penal Code (XLV of 1860), section 378—Theft—Fish in pond—When can form the subject of theft.

As long as water flows in and out of a pond thereby enabling fish to enter and leave it, the fish are free and in a state of nature, and so no more belong to the owner of the pond than a bird that settles on a tree in a person's garden belongs to that person; but when once the water has fallen to such a level that fish cannot leave it, then they are trapped and consequently in the possession of the owner of the pond. Then any person who takes fish from that pond without the owner's consent with intent to cause him loss, necessarily commits theft.

The Queen v. *Revu Pothadu*, (1882) I.L.R. 5 Mad. 390 and *Subba Reddi* v. *Munshoor Ali Saheb*, (1900) I.L.R. 24 Mad. 81, distinguished.

Mandu Paidigadu v. *Kadimchetti Tammayya*, 1914 M.W.N. 168, Re *Subbian Servai*, (1911) 22 M.L.J. 184: I.L.R. 36 Mad. 472 and *Nokolo Behara*, In re, (1927) 53 M.L.J. 759: I.L.R. 51 Mad. 333, followed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate, Saidapet, dated 12th February, 1942, and made in Criminal Appeal No. 4 of 1942, presented against the order of the Court of the Stationary Second Class Magistrate, Tiruvellore in C.C. No. 553 of 1941.

V. C. Viraraghavan for Petitioner.

M. Natesan for Accused.

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1. 1941 M.W.N. (Crl.) 100.

*Crl.R.C. No. 256 of 1942. (Crl.R.P. No. 242 of 1942). 4th August, 1942.

Krishna Reddi *v.* Muniappa Reddi.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—Although this petition was against an order of acquittal, it was admitted because the learned appellate Magistrate seemed to lay down a principle which might be injurious to the interests of the Thirumalai Devasthanam if that order were allowed to stand without criticism.

The trial Court found that the pond in question was an irrigation pond belonging to the Thirumalai Devasthanam, although some of the water that flowed from it irrigated fields that did not belong to the Devasthanam. It is argued that because the pond belonged to the Devasthanam, the fish in the pond must also belong to the Devasthanam and that any person taking fish from that pond without permission therefore committed theft. The appellate Court set aside the conviction and acquitted the accused because "fish in a pond cannot form the subject of theft"; and it quoted as authorities *The Queen* v. *Revu Pothadu*[1] and *Subba Reddi* v. *Munshoor Ali Saheb.*[2] *The Queen* v. *Revu Pothadu* [1] is no authority because it seems to deal with fish in a creek presumably off a river. *Subba Reddi* v. *Munshoor Ali Saheb* [2] is relevant; but we do not know from the decision the state of the pond. All we know is that it was an irrigation pond and that therefore from time to time water flowed from that pond to irrigate fields. The law relating to the taking fish from a pond, has been made clear in this Court by three decisions, two of which Re *Subbian Servai*[3] and *Nokolo Behara,* In re,[4] follow *Manchu Paidigadu* v. *Kadimchetti Tammayya.*[5] The law laid down by these three decisions is that as long as water flows in and out of the pond, thereby enabling fish to enter and leave it, the fish are free and in a state of nature; and so no more belong to the owner of the pond than a bird that settles on a tree in a person's garden belongs to that person; but when once the water has fallen to such a level that fish cannot leave it, then they are trapped and consequently in the possession of the owner of the pond. That being so, any person who takes fish from that pond without the owner's consent with intention to cause him loss, necessarily commits theft.

I do not wish to apply the above principles to the facts of this case, which are not very clear; because the Courts below did not have in mind the precise point that they had to determine. The petitioner does not press for the setting aside of the acquittal and for the conviction of the accused. It seems desirable that the parties should settle their dispute in Civil Court.

The petition is dismissed.

K. S. ——— *Petition dismissed.*

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1. (1882) I.L.R. 5 Mad. 390.
2. (1900) I.L.R. 24 Mad. 81.
3. (1911) 22 M.L.J. 184: I.L.R. 36 Mad. 472.
4. (1927) 53 M.L.J. 759: I.L.R. 51 Mad. 333.
5. 1914 M.W.N. 168.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

Govinda Krishna Aiyar .. *Appellant** *(Respondent)*

v.

Minor Sankaralinga Naicker, through his next friend and guardian *ad litem*, Subbia Naicker .. *Respondent* *(Petitioner).*

Govinda Krishna Aiyar *v.* Sankaralinga Naicker.

Practice—Notice of execution—Service by affixing—Express declaration by Court that it was duly served—If essential—Limitation Act (IX of 1908), section 6—Application by minor defendant to set aside sale and other proceedings in execution—Not governed by section 6 of the Limitation Act.

Where the return on the notice of an execution petition was that it was affixed because the guardian of the defendants who were minors was not to be found and was evading service and the Court thereupon declared the defendants *ex parte* it cannot be said that the guardian had not been duly served with notice of the execution petition merely because there was no express declaration by the Court as to due service of the notice. *Venkata Rayanim Varu* v. *China Bapanna,* (1939) 2 M.L.J. 926, relied on; *Palaniappa Chettiar* v. *Thaivanai Achi,* (1936) 71 M.L.J. 317, not followed.

The benefit of section 6 of the Limitation Act is available to a minor only in respect of a suit or an application for execution of a decree. An application by a minor defendant to set aside the sale and other proceedings in execution taken by the decree-holder is not governed by section 6 of the Limitation Act.

Appeal against the order of the Court of the Subordinate Judge of Tinnevelly, dated 9th December, 1939, and made in E.A. No. 419 of 1938 in O.S. No. 45 of 1926.

A. Ramaswami Aiyar for Appellant.

K. R. Rangaswami Aiyangar and *S. Venkatesan* for Respondent.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.

Krishnaswami Ayyangar, J.—The order of the learned Judge setting aside the sale and all proceedings in execution taken by the appellant subsequent to the decree in O.S. No. 45 of 1926 is based upon his conclusions on two points. The first is that the guardian *ad litem* of defendants 4 and 5 had not been duly served with notice of the Execution Petition No. 132 of 1932. What happened was, notice was taken out by the appellant decree-holder and the return on the notice was that it was affixed because the guardian was not to be found and was evading service. On this return being brought to the notice of the Court, the Court declared these defendants *ex parte*. Our attention has not been drawn to the terms of this order; but we understand that this was what happened at the time when the order declaring them *ex parte* was passed. It is true that the view was taken in *Palaniappa Chettiar* v. *Thaivanai Achi*[1] by a single learned Judge of this

*A.A.O. No. 481 of 1940 and C.R.P. No. 1271 of 1940. 3rd July, 1942.

1. (1936) 71 M.L.J. 317.

Court that there should be an express declaration that service is sufficient if the Court is to proceed further in any given matter. The question however was again considered by a Bench of this Court in *Venkata Rayanim Varu* v. *China Bapanna*[1] and it was held that though it is desirable that all Courts should observe the mandatory provision of Order 5, rule 19 and "either declare that the summons has been duly served or order such further service as it thinks fit", the absence of such an express declaration will not involve as a necessary consequence a finding that a summons has not been duly served. This decision had apparently not been reported at the time and it is probable that the learned Judge in coming to the conclusion on this point was guided by the procedure indicated in the earlier decision.

Govinda Krishna Aiyar *v.* Sankaralinga Naicker.

Krishnaswami Ayyangar, J.

The second point raised by the appellant before the learned Judge was that the present applications were barred by limitation. The learned Judge in rejecting this contention has made the observation that there cannot be any question of limitation in this case as the petitioner (5th defendant) is still a minor. It is unfortunate that the learned Judge did not refer to the language of section 6 of the Limitation Act. If he had done so, he would have found that the benefit of the section is made available to a minor only in respect of a suit or an application for execution of a decree. It is only in these two cases, the minor is given the privilege of taking the proceedings mentioned in the section within the same period after the disability has ceased as would otherwise have been available to him. It cannot for a moment be suggested that either of the applications before the lower Court is within the language of section 6. We must hold that the learned Judge is entirely wrong in holding as he did that applications of this kind are governed by section 6. The order of the learned Judge is therefore set aside, and E.As. Nos. 418 and 419 of 1938 on the file of the lower Court are dismissed. The appellant is entitled to his costs in C.M.A. No. 481 of 1940 against the respondent.

K. S. — *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD ATKIN, LORD ROMER AND SIR MADHAVAN NAIR.

Bank of Upper India, Limited .. *Appellant**

v.

Robert Hercules Skinner and others .. *Respondents.*

P.C.

Bank of Upper India, Ltd. *v.* Skinner.

Limitation Act (IX of 1908), section 19—Acknowledgment by mortgagor after parting with all his interest in hypotheca to a purchaser—Does not bind the purchaser.

Acknowledgments made by a mortgagor after he had parted with all his interest in the mortgaged property to a purchaser do not bind the purchaser.

Sir T. Strangman and *W. Wallach* for Appellant.

J. M. Pringle for Respondents.

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1. (1939) 2 M.L.J. 926.

*P.C. Appeal No. 45 of 1941. 15th June, 1942.

P.C.

Bank of Upper India, Ltd. v Skinner

Lord Atkin.

Their Lordships' Judgment was delivered by

LORD ATKIN.—In these cases there are five consolidated appeals from five decrees of the High Court at Allahabad who varied decrees of the Subordinate Judge, Meerut, in mortgage suits instituted by the appellant. The transactions between the plaintiff bank now in liquidation and the relations of the respondents, and between those relations and the respondents, were numerous, and have been the subject of other litigation. But the question to be decided on this appeal, the construction of section 19 of the Indian Limitation Act, is a simple one, and the point can be discussed upon a concise statement of the facts. At various dates between 1904 and 1912 four brothers, cousins of the respondents, executed five mortgages of properties in Meerut, United Provinces and in Hissar, Punjab. In one the mortgagors were the four brothers and in four only two of the brothers disposing of their two-fifth shares in the properties. Two of the mortgages were expressed to be cash credit loans payable after three months' notice, the others were for periods of five and two years respectively. The last mortgage was given on 21st November, 1912. On 30th May, 1914, the four brothers and a sister who between them at that date possessed the entire property in the lands in question subject to the mortgages sold to the respondent R. H. Skinner certain of the mortgaged lands on the terms mentioned in the deed of that date. These properties are in the Punjab to which the Transfer of Property Act does not apply. Though some doubt has been expressed on the point by the High Court of Lahore in a similar case also heard on appeal before this Board their Lordships have no difficulty in concluding that this document was intended to affect the transfer of the property and should have been registered. In fact it was not. Shortly after the execution of the document R. H. Skinner was given possession of the properties purchased and obtained mutation into his name. In 1924 the respondent R. H. Skinner bought under a money decree obtained by another banking company against one of the mortgagors a share in some of the mortgaged property situate in the United Provinces.

By the terms of the agreement of 30th May, 1914, it seems to have been contemplated that R. H. Skinner would pay the agreed price to the plaintiff bank in reduction of the mortgages. He did not however come to any agreement with the bank, and in 1917 the vendors commenced a suit against R. H. Skinner seeking specific performance of the agreement. This was eventually decreed under a judgment of the Privy Council which gave relief to the defendant if within six months he made the necessary payments to the bank. This he did not do and the decree accordingly remains unconditionally in force.

No interest was paid on the mortgages after May, 1914, but the mortgagors from time to time made written acknowledgments to the bank. Some question arose as to whether all of these were given before the time of limitation had run in favour of the mortgagors, but their Lordships assume for the purposes of this case they were given in time to bind the mortgagors in respect

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of their personal liability for the debt. The latest was given in 1916, and the present suits were instituted on 24th June, 1927. Article 132 of the Limitation Act provides that in a suit to enforce payment of money charged upon immovable property the period of limitation is twelve years from the time when the money sued for becomes due. It is obvious that the period of limitation had expired if it had not been for the acknowledgments and on that account the plaintiffs relied on section 19 (1) of the Limitation Act:

> "Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed".

The question is whether the acknowledgment by a transferor in order to bind the transferee can be given after the transfer of title, or whether the section only applies where the acknowledgment has been made before the transferee has derived his title from the acknowledgor. The matter has been frequently discussed in the Courts in India with conflicting decisions. Their Lordships have had the advantage of having the principal decisions discussed before them by counsel and have no doubt that 'much can be said on both sides'. But it must be remembered that the section is perfectly general, it is not confined to mortgages; it applies to every form of property movable and immovable; and it would appear strange that a man in wrongful possession of property may transfer it to a *bona fide* purchaser and that the latter is not quieted in his possession by the lapse of time, but may be defeated by acknowledgments made without his knowledge by the person from whom he derived title. This is a doctrine which Lord Westbury in *Bolding* v. *Lane*[1] said leads to very extraordinary and alarming consequences. He was dealing with a suggestion that under the Real Property Limitations Act of 1843 an acknowledgment of the mortgagor entitles the first mortgagee to recover all the arrears of the interest out of the land as against the second and subsequent mortgagees who would otherwise be protected by the statute. 'The Court' he says, 'is bound by every principle of judicial interpretation to find if possible a construction of the statute which does not involve consequences so inconsistent with natural justice.' The principle was applied to this very section by Mukerji, J., in *Surjiram Marwari* v. *Barhamdeo Prasad*[2] and their Lordships are prepared to adopt the reasoning of that very learned Judge in the present case. In addition to the analogy used by Mukerji, J., of section 13 of the Civil Procedure Code there might be adduced the analogy of admissions under the Indian Evidence Act which are binding if made by persons from whom the parties to the suit have derived their interest but only if they are made during the continuance of the interest of the person making the statements. The fact that the statute expressly limits the nature of the admission does

1. (1863) 46 E.R. 47: 1 De G.J. & S. 122.
2. (1905) 1 C.L.J. 337.

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not detract from the general proposition that any different result would effect serious injustice. On the whole therefore their Lordships come to the conclusion that the acknowledgments made in this case by the mortgagors after they had parted with all their interest to the purchaser do not bind the purchaser: and that the High Court came to a correct conclusion on this point.

Mr. Pringle for the respondents took the further point that the purchaser derived no title from the mortgagors in this case inasmuch as the deed of transfer was not registered; and therefore he could claim by adverse possession. There seems much to be said for this contention but in view of the opinion expressed on the first point it is unnecessary further to discuss it. Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of the appeal.

K. S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE HAPPELL.

The firm of Patnam Lakshminarayana Chetty carrying on its business at Kurnool represented by its managing partner, Patnam Lakshminarayana Chetti .. *Appellant** (*Petr.*)

v.

Grandhe Seshamma (deceased) and others .. *Respondents* (*Respts. & L. R. of 1st Respt.*).

Lakshminarayana Chetty v. Seshamma.

Succession Act (XXXIX of 1925), sections 372 and 373—Application for grant of certificate—Contest—Court's duty to decide right of party to obtain it.

If there are grounds for entertaining an application for the grant of a succession certificate under section 372 of the Succession Act, but the right to a certificate is contested, it is plain that the Court must make an order for the grant of the certificate to one party or the other. The Court cannot dismiss the petition on the ground that the matter involved complicated questions of fact and law which would have to be gone into before it can decide which, party has the right to the succession certificate.

Appeal against the order of the District Court of Kurnool, dated 8th November, 1939, and made in O.P. No. 47 of 1939.

Ramanujam, Venkatasubbiah and *N. Jaganmohana Rao* for Appellant.

Respondents not represented.

The Judgment of the Court was delivered by

Happell, J.

Happell, J.—The appellant was directed by the District Munsiff of Kurnool in whose Court he had filed a suit for recovery of a sum due under a promissory note to produce a succession certificate. He accordingly filed a petition in the Court of the District Judge of Kurnool under section 372 of the Indian Succession Act. This petition was opposed by one of the defendants in the suit on the promissory note, who was also the wife of the assignor of the promissory note to the appellant. She

*A.A.O. No. 34 of 1940. 30th July, 1942.

Lakshminarayana Chetty v. Seshamma.

Happell, J.

claimed that the debt in question together with other properties had been left to her husband and herself jointly and that her husband had no right to assign the promissory note to the appellant. The learned District Judge, taking the view that complicated questions of fact and law would have to be gone into before it could be decided which party had the right to the succession certificate proceeded to refer the parties to a suit, if so advised, and dismissed the petition. The learned District Judge was no doubt entitled to dismiss an application under section 373 if he was satisfied that there were no grounds for entertaining it. The District Judge, however, has not dismissed the application for that reason, but for the reason that he thought the case was too complicated to be decided in summary proceedings. This is not a valid reason as is clear from section 373, sub-section (3) of the Act read with sub-section (2). If there are grounds for entertaining an application but the right to a certificate is contested, it is plain that the District Judge must make an order for the grant of the certificate to one party or the other. Under section 373 (2) he can make the order after going into the merits of the case. But under section 373 (3), although again he must make an order, he need not determine questions of law or fact, which are too intricate and difficult for determination in summary proceedings.

The appeal must therefore be allowed and the application will be returned to be determined by the learned District Judge in the light of these observations. He will be at liberty to make an order under section 373, sub-section (2) or (3) or to dismiss the application if he thinks that there are not grounds for entertaining it. Costs of this appeal and of the petition in the lower Court will abide the result.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Minor Periakaruppan by mother and guardian, Rakkayee Ammal .. *Petitioner** (*Defts.* 1 & 2)

v.

T. S. Subbarama Aiyar and others .. *Respondents* (*Plffs. and Defts.* 3 & 4).

Periakaruppan v. Subbarama Aiyar.

Partnership Act (*IX of* 1932), *section* 28—*Suits alleging partnership*—*"Holding out" found*—*Whether sufficient for basing a decree*—*Defendant village officer*—*Breach of Government Servants' Conduct Rules*—*Whether rendering transaction null and void.*

Suits were brought against the petitioner and another on the ground that the petitioner's father and that other person were partners in a business to which sums of money had been lent. They were decreed on the footing of a "holding out" by the petitioner's father, making him liable under section 28 of the Partnership Act for the moneys advanced. On the questions whether decrees could be passed on that footing and whether by reason of the petitioner's father being a village officer who was prohibited by the Government Servants' Conduct Rules from engaging in any business the transactions were null and void,

*C.R.P. Nos. 2021 and 2022 of 1940. 8th July, 1942.

Periakaruppan v. Subbarama Aiyar.

Held, that the evidence adduced for proving the partnership having proved the holding out, the petitioner was not prejudiced by the fact that the suits were not brought on the footing of a holding out.

It is only where an act was prohibited by statute that the transactions become null and void, but a mere breach of Government Servants' Conduct Rules, inasmuch as it is capable of being excused and condoned, would not invalidate every transaction which is the subject of such misconduct.

Sundrabai v. *Manohar*, A.I.R. 1933 Bom. 262, considered.

Petitions under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decrees of the Court of the District Munsiff of Madura Town, dated 18th June, 1940, and passed in S.C.S. Nos. 2004 of 1938 and 1622 of 1938 respectively.

R. Kesava Aiyangar for Petitioner.

O. V. Baluswami and *V. Minakshisundaram* for Respondents.

The Court delivered the following

JUDGMENT.—Two suits were brought against the petitioner and another on the ground that the petitioner's father and the other defendant were partners in a business to which sums of money were lent by the plaintiffs in these suits. These suits were decreed.

Various objections are raised to these decrees. One is that as the suits had been laid on the footing of a partnership, it was not open to the Court to pass decrees in favour of the plaintiffs on the footing of a holding out by the petitioner's father, which would make him liable under section 28 of the Partnership Act for the sums of money advanced. The suits were brought on the facts as they seemed to the plaintiffs, who deduced their legal relationship from the conduct of the 2nd defendant and the 1st defendant's father in S. C. S. No. 2004 of 1938. It was only at the time of the trial, on account of evidence adduced by the 1st defendant, that some doubt was thrown on the existence of the partnership. The evidence adduced for proving a partnership proved the holding out; and the defendant petitioner was not prejudiced by the fact that the suits were not brought on the footing of a holding out. Moreover, the learned District Munsiff seems to have found that there was a partnership; though certain sentences two paragraphs later would rather suggest the contrary. In paragraph 43 of his judgment, the learned District Munsiff definitely says, "I have come to the conclusion that Suppayya Ambalam, father of 1st defendant, was a partner with Ramaswami Pillai in P. Rm. firm"; but in paragraph 45 he says, "Therefore on the facts proved in this case Suppayya Ambalam must be held liable on the principle of holding out laid down in section 28 of the Indian Partnership Act." In view, however, of the definite language used in paragraph 43, it would seem that the District Munsiff was of the opinion that the 1st defendant's father's estate would be liable both on the ground that the father was a partner and on the principle of holding himself out as a partner.

The second contention raised in these petitions is that the 1st defendant's father was a village officer and was prohibited by the Government Servants' Conduct Rules from engaging in business without the permission of the Government, and that

therefore all the transactions that were entered into on account of the partnership were null and void. The learned advocate for the petitioner cites *Sundrabai* v. *Manohar*[1] in support of his contention. Although the Government Servants' Conduct Rules contain this provision and though its infringement would amount to misconduct which, under the Village Officers' Act is punishable, yet that does not mean that every act which is the subject of misconduct is null and void. Such misconduct can, and frequently is, condoned and excused; but a breach of a statute cannot be. The authority quoted does not go so far; and it expressly draws a distinction between disobedience of the Government Servants' Conduct Rules and doing an act prohibited by statute. That case related to a police officer who had purchased land in contravention of section 33 of the Police Act. It is pointed out that where an act is prohibited by statute it becomes null and void; and the learned Judges distinguish an Allahabad case on the ground that the transaction there was prohibited only by the Government Servants' Conduct Rules.

Periakaruppan v. Subbarama Aiyar.

Lastly, it is contended that a decree should not have been given against the 1st defendant petitioner on the pious obligation theory without an express reference in the plaint to the source of the obligation. The principle of law whereby a son becomes liable for his father's debts unless they are immoral or illegal is too well-known to need special pleading.

On all grounds, therefore, these petitions fail and are dismissed with costs (two sets).

K. C. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

T. R. Srinivasa Rajagopala Aiyangar .. *Appellant** (*Defendant*)

v.

Sri Santhanaramaswami Koil Vagaira Devasthanam, Needamangalam, by R. Natesa Aiyar (now Executive Officer) .. *Respondent* (*Plaintiff*).

Srinivasa Rajagopala Aiyangar v. Sri Santhanaramaswami Koil Devasthanam.

Madras Estates Land Act (I of 1908), sections 3 (5), 77 and 112 and Madras Local Boards Act (XIV of 1920), sections 3 (22) and 88—Suits questioning landlord's right to sell holding pending before Collector—No bar to suit for rent and cesses—Liability of a "ryot" for cesses.

The landholder's attempt to bring the ryot's holding to sale by enforcing the charge for rent he has under section 5 of the Estates Land Act cannot suspend his right of suing for the rent. There is nothing in the Act to preclude the landholder from enforcing the remedies available under section 77 simultaneously. The pendency therefore of suits brought by a ryot contesting the landholder's right of sale under section 112 is no bar to the institution of a suit for recovering the same rent under section 77.

Reading section 3 (5) of the Estates Land Act and section 3 (22) of the Local Boards Act together, it is clear that a "ryot" is a tenant within the meaning of section 88 of the Local Boards Act and the ryot is under a statutory liability to pay local cesses.

Appeal against the decree of the District Court of West Tanjore at Tanjore, in A.S. Nos. 188 and 268 of 1937 preferred

1. A.I.R. 1933 Bom. 262.

*S.A. No. 1390 of 1941. 27th August, 1942.

Srinivasa Rajagopala Aiyangar *v.* Sri Santhana-ramaswami Koil Devas-thanam.

against the decree of the Court of the Deputy Collector of Mannargudi Division in S.S. No. 13 of 1936.

T. R. Arunachalam for Appellant.

K. Muthuswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit brought by the respondent under section 77 of the Madras Estates Land Act for the recovery of rent and local cess for faslis 1342, 1343 and 1344. The trial Court granted a decree for the rent due for all the faslis and the local cess due for fasli 1342 only, disallowing the claim for the cess in respect of faslis 1343 and 1344. Both parties appealed and while the appeals were pending the Madras Agriculturists' Relief Act came into force. Under the provisions of section 15 of that Act the defendant, appellant herein, who is an agriculturist, paid the rent for faslis 1346 and 1347 and claimed that the arrears due for the earlier faslis including the rent now sued for should be deemed to be discharged. This claim was allowed. As regards the local cess which is not affected by that Act, the learned District Judge held that the landholder was entitled to the cess claimed for all the faslis and passed a decree accordingly dismissing the appeal of the tenant.

Two contentions have been raised by Mr. Arunachala Aiyar on behalf of the appellant. Firstly, he maintained that the respondent having already initiated summary proceedings under section 112 of the Estates Land Act for the sale of the appellant's holding for recovery of the same rent and having thus caused the appellant to institute summary suits contesting the respondent's right of sale which are still pending before the Collector, the respondent was debarred from suing under section 77 of the Act. This section as amended by Act VIII of 1934 provides three remedies for the recovery of unpaid rent, *viz.*, a suit before the Collector, distraint and sale of movable property, and sale of the ryot's holding. There is nothing in the section or elsewhere in the Act to preclude the landholder from enforcing these remedies simultaneously. Mr. Arunachala Aiyar however placed reliance upon the decision in *Lehain* v. *Philpott*[1] and certain observations in *Venkatachalapathi Aiyar* v. *Robert Fischer*[2] a case decided under the Rent Recovery Act of 1865. In the former case it was held that when a landlord distrained for rent, he could not bring an action for the rent so long as he held the distress, though it was insufficient to satisfy the rent. Learned counsel contended that the same principle should be applied when the landlord, instead of distraining for rent, attempted to sell the ryot's holding thereby compelling the tenant to bring summary suits contesting the landholder's right to the rent claimed. This view receives some support from certain observations in *Venkatachalapathi Aiyar* v. *Robert Fischer*,[2] where the English case is referred to, but the observations are *obiter* as the only point decided was that the mere institution of a suit for rent did not make it illegal to proceed further with the summary

1. (1875) L.R. 10 Exch. 242.
2. (1907) 17 M.L.J. 294: I.L.R. 30 Mad. 444.

proceedings then pending for the sale of the ryot's holding for recovery of the same rent, and that the resulting sale was valid. Turning to *Lehain* v. *Philpott*,[1] it will be seen that the real ground of the decision is contained in the observation of Bayley, J., in *Edwards* v. *Kelly*,[2] which was quoted and followed:

> "After the plaintiff had distrained he held in his own hands his remedy for recovering the rent, and the tenant was at that time no longer indebted, for so long as the landlord held the goods under distress, the debt due from the tenant was suspended."

That is to say, the movables distrained are regarded as a pledge and the taking and holding of such pledge by the landlord who has thus in his hands the means for satisfying his claim for rent is considered a good plea to an action on the debt. It is worthy of note that, as pointed out by Cleasby, B., the rule is not based upon the principle of election of remedies, though some of the older English decisions proceeded on that principle. Whether such a restriction on the landholder's statutory remedy by way of a suit before the Collector can be imported on the analogy of the English rule when the Act places no such restriction upon it, it is unnecessary to decide in the present case as no distress has been levied. But the rule cannot, in my opinion, have any application where the landholder has merely attempted to bring the ryot's holding to sale. The rent is a first charge upon the holding under section 5 of the Act, and it is difficult to see on what principle the landholder's attempt to enforce the charge by bringing the holding to sale, can be said to suspend his right of suing for the rent. As already observed, the Act does not say that these remedies should not be exercised simultaneously, and in the absence of any such provision, it is not for the Court, in my opinion, to impose such a restriction based on the analogy of the principle that distress is a pledge, and so long as it is held, operates as a bar to a suit for rent. On the other hand, the provision in section 77-E that all proceedings to sell the holding for an arrear of rent taken before the passing of the decree in a suit for rent shall be stopped and not proceeded with further would seem to contemplate a simultaneous exercise of the two remedies by the landholder. The argument based on the hardship to the ryot of having to carry on two parallel proceedings in respect of the same matter has no force as section 10, Civil Procedure Code, which is applicable to suits under the Act can be invoked in proper cases to prevent such hardship. I am, therefore, of opinion that the pendency of the suits brought by the appellant contesting the respondent's right of sale under section 112 of the Act was no bar to the institution of the present suit for recovering the same rent under section 77.

The appellant's next contention that he is not liable to pay local cess for faslis 1343 and 1344 is equally untenable. It is no doubt true that the pattas issued to the appellant for those faslis did not provide for the payment of any local cess but this is by no means conclusive. The landholder's claim to recover from his tenant a part of the local cess paid by him to Government is really

1. (1875) L.R. 10 Exch. 242.
2. (1817) 105 E.R. 1219: 6 M. & S. 204.

Srinivasa Rajagopala Aiyangar v. Sri Santhana-ramaswami Koil Devas-thanam.

based upon section 88 of the Madras Local Boards Act and does not depend upon the exchange of pattas and muchilikas. It was argued that a ryot owning the kudivaram in his holding could not be said to be a tenant as defined in the Local Boards Act. This argument cannot be accepted. A ryot is defined in section 3 (15) of the Estates Land Act as a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it, and a tenant is defined in section 3 (22) of the Local Boards Act as including all persons who, whether personally or by an agent, occupy land under a landholder. It is clear from these definitions that a ryot is a tenant within the meaning of section 88 of the Local Boards Act, and that the appellant is therefore under a statutory liability to pay the local cess claimed. It was so held in *Muthuramalinga Sethupathi* v. *Mahalinga Raju*[1] and section 16 of the Agriculturists' Relief Act proceeds on the same view.

The appeal therefore fails and is dismissed with costs.

Leave refused.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Garimalla Sitaramamurti .. *Appellant**
(1*st Respt.—Appelt.*)

v.

Thamma Lakshminarayanamurti and others .. *Respondents*
(*Petr. and Respts.* 2 *&* 3—*Respts.*).

Sitaramamurti v. Lakshminarayanamurti.

Madras Agriculturists' Relief Act (IV of 1938)—*Application under section* 19—*Trial Court's order for amendment—Appeal against, under Rule framed, under the Act—Rule subsequently declared* ultra vires—*Second appeal against appellate Court—Competency—Civil Procedure Code, Order* 41, *rule* 1—*Copy of amended decree not filed in appellate Court—Presentation, if valid.*

In an application filed under section 19 of the Madras Agriculturists' Relief Act, the District Munsiff directed an amendment of the decree. An appeal was filed against the order, under the rule framed by the Local Government under the Act. The appellate Court entertained the appeal and confirmed the lower Court's order on the merits. In a civil miscellaneous second appeal filed against that order, objection was taken that the appeal to the lower Court was incompetent, as the rule giving right of appeal had been declared *ultra vires*. The appellant prayed that the civil miscellaneous second appeal may be treated as a second appeal from the amended decree of the District Munsiff and that he may be allowed to pay the deficient court-fee due in the lower appellate Court and the High Court.

Held, that if the lower appellate Court had, after entertaining the incompetent appeal and thus assuming a jurisdiction it did not possess merely affirmed the trial Court's decree, there was no right of second appeal, though the position will be different if the lower appellate Court had interfered with the decree.

Held, *further*, that as the amended decree had not been filed in the lower appellate Court, it was not possible in view of Order 41, rule 1, Civil Procedure Code, to treat the appeal in the lower Court as one from

1. (1917) 33 M.L.J. 379.
*A.A.A.O. No. 169 of 1940. 7th July, 1942.

Sitarama-murti v. Lakshmi-narayana-murti.

the amended decree, and to regard the case as one where the defect in the record had been overlooked by the lower Court.

Sundaram Aiyar v. Raja Rajeswara Muthuramalinga Sethupathi, (1922) 44 M.L.J. 279, referred to.

Anna Bati Dasee v. Parameshwar Mallik, I.L.R. (1937) 1 Cal. 573, distinguished.

Held, also, in view of the practice in the mofussil, that there would be sufficient compliance with Order 41, rule 1, if a copy of the original decree and a copy of the order directing the amendment, the two read together being the only amended decree available to the party, are filed with the memorandum of appeal.

Appeal against the order of the Court of the Subordinate Judge of Chicacole in A.S. No. 120 of 1939 preferred against the order of the Court of the District Munsiff of Chicacole in I.A. No. 636 of 1938 in O.S. No. 308 of 1934.

B. Jagannatha Das for Appellant.

J. Krishnamurthi for Respondents.

The Judgment of the Court was delivered by

Wads-worth, J.

Wadsworth, J.—The appellant was the decree-holder in a suit decided by the District Munsiff of Chicacole. The judgment-debtor filed a petition under section 19 of Act IV of 1938 and as the result of that petition the trial Court directed an amendment of the decree. Against the order directing the amendment an appeal was filed to the Subordinate Judge under the rule framed by the Local Government under Act IV of 1938 which rule gave a right of appeal against an order under section 19 of that Act. The appeal petition was accompanied by a copy of the decretal order of the trial Court but not by a copy of the amended decree. The Subordinate Judge entertained the appeal as an appeal against this order and dismissed it holding that the learned District Munsiff's decision was correct. The present civil miscellaneous second appeal has been filed in this Court and it is objected that no appeal lay to the Subordinate Judge, the rule providing for a right of appeal having been declared to be *ultra vires*. This objection is met by a prayer from the appellant that he may be permitted to pay the deficient court-fee in the lower appellate Court treating the appeal to that Court as an appeal against the amended decree and that he may also be permitted to pay the deficient court-fee in this Court treating the civil miscellaneous second appeal as a regular second appeal. It is undeniable that similar prayers have been granted by this Court in several cases where no objection has been raised to the procedure. No doubt the position is different in cases in which the lower appellate Court assuming a jurisdiction which was not in fact vested in it has amended the trial Court's decree. But it cannot be said that when the lower appellate Court has wrongly assumed an appellate jurisdiction but has declined to interfere with the trial Court's decree, any right of second appeal is conferred by that wrongful assumption of jurisdiction. The decisions in *Raman Nambyar v. Rayiram Naman*[1] and similar cases would not govern a case in which the lower appellate Court has left the trial Court's decree intact.

1. (1934) 67 M.L.J. 43: I.L.R. 57 Mad. 777.

Sitaramamurti v. Lakshminarayanamurti. —— Wadsworth, J.

The objection has been raised before us that this Court cannot treat the lower appellate Court's decision as a decision in an appeal from the amended decree when in fact the amended decree was not before the lower appellate Court at all. Order 41, rule 1 of the Code of Civil Procedure requires that a memorandum of appeal shall be accompanied by a copy of the decree appealed from and it has been held—vide *Sundaram Aiyar* v. *Raja Rajeswara Muthuramalinga Sethupathi*[1]—that a memorandum of appeal which is not accompanied by a copy of the decree appealed from is incompetent. What therefore we are asked to do is to treat a competent appeal from the order amending the decree as an incompetent appeal from the amended decree and to excuse the defect in this incompetent appeal which defects were not in fact overlooked by the lower appellate Court. Had the lower appellate Court been satisfied with the record of the appeal and entertained it as an appeal against the amended decree the decision of the lower appellate Court would no doubt be appealable before us in spite of the defects in the record before that Court. But in fact the lower appellate Court did not purport or intend to treat this appeal as an appeal against the amended decree and did not overlook any defects in the appeal as presented.

An alternative line of argument has been based on the decision in *Anna Bati Dasee* v. *Parameshwar Mallik*,[2] which was rather a special case arising out of facts not at all similar to those with which we are now confronted. That was a case in which the decree was in two distinct parts. To one part of the decree was appended a very bulky Commissioner's report with a number of maps the copying of which would be extremely expensive. The other part of the decree was simple and self-contained and it was this latter part alone the correctness of which was canvassed in the appeal. The learned Judges held in the special circumstances of that case that the appeal record sufficiently complied with the provisions of Order 41, rule 1, notwithstanding the fact that the copy of the decree did not contain the appendices to the irrelevant part of the decree. We do not consider this decision as authority for the view that in any case the appellant is entitled to attach to his memorandum of appeal a mere extract of so much of the decree as he challenges.

It is objected that in many of these cases under section 19 of Act IV the practice in the mofussil Courts has been merely to direct the amendment of the decree in a particular way and to rest content with a decretal order embodying this direction without actually carrying out the amendment of the original decree. Granted so much, we have little doubt that there would be sufficient compliance with Order 41, rule 1, if an appeal against the amended decree was accompanied by a copy of the original decree together with a copy of the decretal order directing its amendment, the two read together being the only amended decree available to the appellant. But we do not consider that the absence of any complete amendment to the original decree would

1. (1922) 44 M.L.J. 279.
2. I.L.R. (1937) 1 Cal. 573.

Sitarama-murti v. Lakshmi-narayana-murti. Wadsworth, J.

be a sufficient warrant for treating the order directing the amendment as itself a sufficient substitute for the amended decree without attaching to that order a copy of the original decree.

It seems to us therefore to follow that there was before the lower appellate Court no valid appeal against the amended decree, nor was there any intention on the part of the lower appellate Court to entertain any such appeal. In such circumstances we do not consider it proper to treat this appeal as something which it clearly was not and merely by recovering the deficient court-fee to give this appeal a character which legally it could not possess. It follows therefore that the second appeal against the dismissal of the incompetent appeal to the lower appellate Court has to be dismissed with costs. It may of course be open to the appellant now to prefer a properly framed appeal against the amended decree with a petition to excuse the delay.

The enclosures filed by the advocate with the memorandum of civil miscellaneous second appeal may be returned to him.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

V. Varadaramanujalu Naidu .. *Appellant** (*Respondent*)

v.

Kaunanoor Naidu .. *Respondent* (*Applicant*).

Varada-ramanujalu v. Kaunanoor Naidu.

Criminal Procedure Code (V of 1898), section 195—Registrar of Presidency Small Cause Court—When a "Court" which can file a complaint for an offence under sections 193 and 199 of the Penal Code.

For the purposes of section 195 of the Code of Criminal Procedure, the Registrar of the Presidency Small Cause Court cannot be deemed to be a "Court" unless he has been in some way or other specially empowered to be a Judge. Accordingly when the Registrar takes security and in order to do so incidentally takes from a party an affidavit the Registrar cannot be said to be acting as a Court and he cannot file a valid complaint against the party under section 195, Criminal Procedure Code for an offence under sections 193 and 199 of the Penal Code in connection with a false statement, that a certain house was his own property, alleged to have been made in the affidavit.

Appeal against the order of the Registrar, Court of Small Causes, Madras, dated the 30th July, 1940, and made in M.P. No. 777 of 1939 in Suit No. 4172 of 1937.

V. Rajagopala Mudaliar for Appellant.

Srinivasaraghavan for Respondent.

The Court delivered the following

JUDGMENT.—The subject-matter of this appeal is a complaint filed by the Registrar of the Court of Small Causes, Madras, under sections 193 and 199 of the Indian Penal Code in connection with a false statement said to have been given by the appellant in an affidavit to the Registrar that a certain house in Madras was his own property. The main point taken in appeal is that the complaint which was filed by the Registrar under the provisions of section 195 of the Code of Criminal Procedure is incompetent because the Registrar is not a Court. It seems to

*A.A.O. No. 241 of 1941. 21st September, 1942.

Varada-ramanujalu Naidu v. Kannanoor Naidu.

me that this objection to the validity of the complaint must be upheld.

Under section 14 of the Presidency Small Cause Courts Act the Provincial Government may invest the Registrar with the powers of a Judge under this Act for the trial of suits in which the amount or value of the subject-matter does not exceed twenty rupees. It is clear from this section that if the Provincial Government has so invested the Registrar with powers, the Registrar when he is trying suits for an amount of twenty rupees or less is a Court, but it seems necessarily to follow that when engaged on every other kind of duty the Registrar is not a Court. The affidavit in question was filed before the Registrar while he was engaged in taking security from the appellant. The Registrar is empowered to take security in any suit or matter according to Order 12 of the Rules of Practice, clause (10). It is argued that in carrying out this particular duty the Registrar is acting in a judicial capacity. In one sense of the word that is no doubt true, and it is significant that five particular powers are specified in Order 12 as being non-judicial or quasi-judicial. By contrast therefore the eleven powers which precede these five may well be called judicial powers, but it is not every person who deals in the widest sense of the word 'judicially' with any matter, that is to say, applies the same principles of hearing and deciding the matter as a Judge would who can be called a 'Court' and Order 1 (*a*) of the Rules of Practice lays down specifically what throughout the various orders the term 'Court' shall mean. "Court" means the Court of the Small Causes, Madras and includes a Judge, and, where he is empowered to exercise the powers of a Judge, the Registrar, of the Court. It seems to me very clear that for the purposes of the Rules of Practice and therefore for the purposes of section 195 of the Code of Criminal Procedure also, the Registrar can never be deemed to be a Court unless he has been in some way or other specially empowered to be a Judge. There is nothing in Order 12 which specially empowers the Registrar to be a Judge, and the only provision which deals with this matter is section 14 of the Act itself to which reference has already been made. It seems to me therefore that it is impossible to hold that when he takes security, and in order to do so incidentally takes from a party an affidavit, the Registrar is acting as a Court. The complaint filed by him under section 195 has therefore no validity and must be quashed.

This appeal is accordingly allowed and the respondent must pay the appellant's costs throughout.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Sundaresam Pillai v. Ramachandra Pillai.

Sundaresam Pillai .. *Petitioner** (*Respondent*)

v.

Ramachandra Pillai .. *Respondent* (*Petitioner*).

Civil Procedure Code (V of 1908), *Order* 9, *rule* 9—*Scope.*

Order 9, rule 9 of the Civil Procedure Code permits the setting aside of an *ex parte* decree only when the plaintiff is unable to be present; and that

*C.R.P. No. 598 of 1941. 3rd July, 1942.

Sundaresam Pillai *v.* Ramachandra Pillai.

inability does not mean inability to raise the wherewithal to continue the suit—whether due to lack of funds or absence of witnesses—but some physical inability such as the break-down of a conveyance or illness.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of East Tanjore at Negapatam, dated the 1st February, 1941, and made in C.M.A. No. 1 of 1941 (I.A. No. 630 of 1940 in O.S. No. 4 of 1940, District Munsiff's Court, Negapatam).

S. Panchapagesa Sastri and *P. S. Ramachandran* for Petitioner.

R. Swaminatha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff in O.S. No. 4 of 1940 on the file of the District Munsiff of Negapatam was repeatedly unready. When the suit was called for hearing on 31st July, 1940, his vakil reported no instructions. The District Munsiff gave the plaintiff a further day to enable him to proceed with the suit. The evidence indicates that the plaintiff was busy until 12-30 the following day in trying to raise money. As he failed to do so, he went home and made no attempt to reach the Court. His suit was consequently dismissed. He put in an application under Order 9, rule 9 to have the decree set aside, alleging that he had been taken ill and was unconscious for two days. The District Munsiff rightly rejected that plea and dismissed the application. In appeal, the District Judge argued that as it was of no use for the plaintiff to come to Court without money or witnesses, he was quite justified in staying away and that his not having either money or witnesses was a sufficient cause for his non-appearance. He therefore allowed the appeal and ordered restoration of the suit on condition that the plaintiff paid Rs. 25 costs to the defendant.

There can be no doubt that the learned District Judge acted without jurisdiction. Order 9, rule 9 permits the setting aside of an *ex parte* decree only when the plaintiff is unable to be present; and that inability does not mean inability to raise the wherewithal to continue the suit—whether by lack of funds or absence of witnesses—but some physical inability such as the break-down of a conveyance or illness.

I do not however consider that there is any necessity in this case to invoke the power of this Court under section 115, Civil Procedure Code, as there is something in the learned District Judge's contention that if the Munsiff thought that the plaintiff should be given some time to raise money to continue the suit, he should have given him at least a few days in which to do so; and that his limiting him to one day was unreasonable. The petitioner is entitled to his costs in the lower Court and in this Court; but in otherwise dismissing the petition the order of the District Judge will be modified by requiring the petitioner not only to deposit the Rs. 25 (if he has not done so) but the costs of the lower appellate Court and of this Court within three weeks of the date of taxation of costs in this Court. If he does not do so, the order of the District Munsiff dismissing the suit will stand.

K.S. —— *Order varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Krishanlal Roopchand and Company .. *Appellant** (*Accused*).

Krishanlal Roopchand and Co., *In re.*

War Risks (Goods) Insurance Ordinance (IX of 1940), *section* 7—*Construction—Firm if 'person' liable for failure to insure goods.*

Any firm, registered or not, would be a 'person' within the meaning of the General Clauses Act, section 3 (39) and it cannot be said that the Government intended under the War Risks (Goods) Insurance Ordinance, section 7, that only private individuals carrying on business in their individual capacity should insure their goods. Accordingly, it is incumbent on 'firms' as well as private individuals trading as such to insure their goods under section 7 of the War Risks (Goods) Insurance Ordinance.

The use of the word "person" or "firm" in section 6 cannot affect the position.

Appeal against the order of the Second Presidency Magistrate of the Court of the Presidency Magistrates, George Town, Madras, in C.C. No. 348-A of the Calendar for 1942.

A. Nagarajan for Appellant.

The Crown Prosecutor (*P. Govinda Menon*) for the Crown.

The Court delivered the following

JUDGMENT.—The appellant was convicted under section 7 (2) of the War Risks (Goods) Insurance Ordinance, IX of 1940, of failing to insure his goods.

The appellant is Messrs. Krishanlal Roopchand and Company; and the principal argument in appeal is that Ordinance IX of 1940 does not make it incumbent on firms to insure their goods but only on private individuals trading as such. The Ordinance lays down the liability of sellers of goods to insure their goods, and section 7 says that after a date fixed by the Central Government, no person shall carry on any business as a seller of goods unless those goods are insured. Section 7 (2) makes any contravention of that provision punishable. The ordinary meaning of "person" under the General Clauses Act includes any company or association or body of individuals, whether incorporated or not. So any firm, registered or not, would be a person within the meaning of the General Clauses Act, section 3 (39); but it is argued that the wording of section 6 of the Ordinance indicates that the word "person" is not intended to be used in that wide sense in the Ordinance; for a distinction is there drawn between a person and a firm. On the general principle that a word should receive the same construction if possible throughout an Act, it is urged that a "person" cannot include a firm. The person referred to in section 6 of the Ordinance is not however of the same class as the person referred to in the other sections of the Act. Section 6 enables the Central Government to delegate their authority for the purpose of the Ordinance to a person or firm, whereas the word "person" in section 7 and elsewhere is a "seller of goods", defined in section 2 (*f*). It seems as if the purpose of section 6 was to confine the agency to a person in the ordinary sense of the word or to a firm. However that may be, it cannot mean that the Government intended that only private individuals carrying

*Criminal Appeal No. 329 of 1942. 17th August, 1942.

on business in their individual capacity should insure their goods. If that were so, the very small section of the merchant community would be affected by the Ordinance. I hold therefore that the appellant was rightly convicted.

Krishanlal Roopchand and Co, *In re.*

The learned Magistrate has imposed a penalty roughly equal to the amount of insurance due. That seems very reasonable, but it is said that the appellant acted throughout in good faith and was ignorant of the provisions of the Ordinance. That seems most improbable, in view of the extent of the appellant's business and the fact that wide publicity was given to this Ordinance and its terms debated by the commercial community and by Chambers of Commerce. I do not think that interference with the sentence is called for.

The appeal is dismissed.

K. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

K. Chinnavadu and others .. *Accused**

Chinnavadu, *In re.*

Criminal Procedure Code (V of 1898), *section* 523—*Proper procedure.*

Where the defence of the accused that they had committed no theft and that the property had been foisted on them, was accepted and the Magistrate doubted whether theft had been committed and acquitted the accused the property should not be ordered to be returned to the accused.

Under section 523 of the Criminal Procedure Code, the Magistrate is bound to order that the property be given to the person entitled to possession.

If he is unable after inquiry to satisfy himself as to the person entitled to possession, he should under section 523 (2) of the Code of Criminal Procedure issue a proclamation before passing final orders.

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code, 1898, by the District Magistrate of Nellore in his letter, dated the 12th January, 1942.

Accused not represented.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—Four persons were charged with committing theft of property from the house of the complainant. The defence of the accused was that they had committed no theft; that the property had been foisted on them, and that panchayatdars were brought to see the property recovered from them. The Magistrate accepted this defence and doubted whether theft had been committed. He therefore acquitted the accused and ordered the property to be returned to them, although the accused by their own defence asserted that the property did not belong to them. The District Magistrate considered that this order was wrong and referred the matter to this Court under section 438 of the Code of Criminal Procedure.

I agree with the learned District Magistrate that the property should not have been ordered to be returned to the accused;

*Crl. R. C. No. 19 of 1942 24th June, 1942.
(Case Referred No. 3 of 1942).

Chinnavadu, *In re.*

because clearly the property did not belong to the accused. The prosecution alleged that the property belonged to the complainant, whereas the accused had no suggestions to make as to the ownership of the property, they merely contending that the property was foisted on them for the purpose of falsely implicating them. Under section 523 of the Criminal Procedure Code the Magistrate is bound to order that the property be given to the person entitled to possession; and as the accused are not entitled to possession, the Magistrate should not have made the order he did. The duty of the Magistrate under this section is to make an inquiry as to the person entitled to possession and to order possession to be given to him. If the Magistrate is unable after inquiry to satisfy himself as to the person entitled to possession, he should under section 523 (2) of the Code of Criminal Procedure issue a proclamation before passing final orders.

The order of the Taluk Magistrate with regard to the disposal of the property is set aside and he is directed to dispose of the property according to the rule laid down in section 523 of the Code of Criminal Procedure.

K. S. ——— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

V. Chengiah Chetti .. *Petitioner* (Accused).*

Chengiah Chetti, *In re.*

Madras Local Boards Act (XIV of 1920), section 227-A—Panchayat Board superseded—Special officer demanding records from President—Prosecution for alleged refusal—Previous sanction of the Local Government—Whether necessary.

The petitioner was the President of a Panchayat Board which had been superseded. The special officer appointed to conduct the affairs of the Panchayat demanded from the petitioner certain records belonging to the Panchayat. It was alleged that the petitioner refused to hand over the records asked for and he was thereupon charged and convicted under section 208 (3) of the Madras Local Boards Act. The question was raised whether the sanction of the Local Government for the prosecution was necessary.

Held, that no sanction was necessary as the petitioner was neither the President nor a member of the Local Board at the time the offence was committed, and in refusing to hand over the records asked for he could not have acted or purported to act in the discharge of his official duty.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional First Class Magistrate of Ranipet in C.A. No. 11 of 1942, presented against the judgment of the Court of the Second Class Magistrate of Arkonam in C.C. No. 54 of 1942.

L. S. Veeraraghava Aiyar for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner was the President of the Panchayat Board, Anwardikanpet, Arkonam Taluk, which Board was super-

*Crl.R.C. No. 307 of 1942 (Crl.R.P. No. 299 of 1942). 11th August, 1942.

Chengiah Chetti, *In re.*

seded by the Government. The special officer appointed to conduct the affairs of the Panchayat demanded from the petitioner certain records belonging to the Panchayat. The allegation is that the petitioner refused to hand over the records asked for. The petitioner was therefore charged and convicted under section 208 (3) of the Local Boards Act. In appeal, his conviction and sentence were affirmed.

The point on which this revision petition was admitted was whether the sanction of the Local Government for the prosecution was necessary. The section that requires the sanction of the Local Government before certain cases can be instituted against a member or President of a Local Board is section 227-A of the Madras Local Boards Act, which says that when the President or any member of a Local Board is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Provincial Government. There are two reasons why the section does not apply. In the first place, the petitioner was neither the President nor a member of the Local Board at the time the offence was committed, because the Panchayat had been already superseded. Secondly, he could not have acted or purported to act in the discharge of his official duty because he had no official duty at that time. Since the petitioner possessed certain records as ex-President of the Panchayat, the special officer of the Panchayat had a right to demand these documents from him, and he could have had no excuse for not giving them up. *Natesa Padayachi, In re*[1] and *Subbayya* v. *Venkata Narasayya*,[2] relied on by the petitioner, deal with a rather nice point of law that does not arise in this petition.

There is no other point in this petition worth considering. The sentence of Rs. 100 fine was certainly not unfitted to the offence.

The petition is dismissed.

B. V. V. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Abdul Salaam Rowther, *In re.*

A. Abdul Salaam Rowther. .. *Petitioner** (*Accused*).

Motor Vehicles Act (IV of 1939), *sections* 42 *and* 123 (1)—*Offence under—Evidence—Driver taking car for personal use—Owner not shown to have "permitted" such user—Prosecution of owner—Sustainability.*

Chapter IV of the Motor Vehicles Act deals with the control of transport vehicles and contemplates primarily the control of the carriage of goods for hire or for reward. Section 42 (2) of the Act lays down certain rules for determining whether a transport vehicle is or is not used for carriage of goods for hire or for reward. Section 42 (1) is more general and prohibits the use of a transport vehicle for any purpose in a public place save in accordance with the conditions of a permit granted or countersigned by proper authority.

Where the driver took the car without the knowledge of the owner to convey himself to the Magistrate's Court where he was being tried for driving without a license and back again, and the owner was thereupon

1. (1940) 1 M.L.J. 760.
2. (1939) 1 M.L.J. 830.

*Crl.R.C. No. 362 of 1942 (Crl.R.P. No. 352 of 1942). 31st August, 1942.

Abdul Salaam Rowther, *In re.*

prosecuted for an offence under section 123 (1) read with section 42 of the Act,

Held, that though the driver was using the vehicle the owner could not be prosecuted for the offence as there was nothing to show that he "permitted" the use of the vehicle. The word "permit" carries with it the meaning that a person actually and knowingly allows the thing to be done. Mere negligence on his part in not locking up his vehicle so that the driver could not take it, would not amount to "permitting" the use of the car.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional First Class Magistrate, Coimbatore, dated 13th March, 1942, and made in C. A. No. 14 of 1942 preferred against the order of the Court of the Sub-Magistrate, Mettupalayam, in C.C. No. 14 of 1942.

R. Rajeswara Rao for *Messrs. John* and *Row* for Petitioner.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner was convicted under section 123 (1) and section 42 of the Motor Vehicles Act of permitting his motor vehicle to be used by his driver in a public place.

Two points were taken in this petition. The first is that the vehicle was not being "used", within the meaning of that term in section 42 (1) and the second is that the petitioner did not "permit" the driver to use the vehicle.

It is true that Chapter IV does deal with the control of transport vehicles and contemplates primarily the control of the carriage of goods for hire or for reward. Section 42 (2) lays down certain rules for determining for the purposes of that chapter whether a transport vehicle is or is not used for carriage of goods for hire or for reward; but section 42 (1) is more general and prohibits the use of a transport vehicle for any purpose in a public place save in accordance with the conditions of a permit granted or countersigned by proper authority. It is admitted that to the knowledge of the petitioner there was no permit for the use of the vehicle. The driver took the car to convey himself to the Magistrate's Court—where he was being tried for driving without a license—and back again; and in doing that the driver was certainly using the vehicle.

The remaining question is whether the owner can be said to have "permitted" the use of the vehicle. The verb "permit" carries with it the meaning that the person actually and knowingly allows the thing to be done. Mere negligence such as the petitioner is said to have been guilty of by not locking up his vehicle so that the driver could not take it, would not amount to "permitting" the use of the car. Whether the petitioner actually knew that the driver was going to use the car or not we do not know; but the duty was cast on the prosecution to prove that the petitioner either used or permitted the use of the vehicle. That duty they have not succeeded in discharging. The use to which the vehicle was put was not one in the ordinary course of the petitioner's business; for the driver was using the vehicle to convey himself from the garage to the Court house and back

again; and so the petitioner may not have known of the use to which his motor vehicle was being put. The petitioner was therefore entitled to succeed; because the prosecution had failed to prove all the ingredients of the offence with which the petitioner was charged.

Abdul Salaam Rowther, *In re.*

The petition is allowed and the conviction and sentence set aside. It is ordered that the fine, if paid, be refunded.

B.V.V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Chinnathambi and others .. *Petitioners* (Accused).*

Chinnathambi, *In re.*

Criminal Procedure Code (V of 1898), section 424—Disposal of appeal under—Duty of Judge to give reasons for his conclusions.

Neither the accused who were released on bail pending their appeal, nor their counsel were present when an appeal was taken up for hearing. The Joint Magistrate thereupon delivered a judgment which after reciting that the accused and their counsel were absent, stated "I have carefully perused the case record, and do not find any grounds to interfere with the judgment of the lower Court. The appeal is dismissed". On revision,

Held: The order would have been unexceptionable if the appeal had been dismissed *in limine* under section 421 of the Criminal Procedure Code. But as notice went to the Public Prosecutor and the accused were released on bail pending appeal, the disposal was one under section 424 of the Criminal Procedure Code, and it is necessary for the appellate tribunal to give reasons for coming to the conclusion it does.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate of Tirupathur, dated 8th July, 1941, and passed in C.A. No. 62 of 1941 preferred against the judgment of the Court of the Sub-Magistrate of Gudiyattam, dated 30th June, 1941, and passed in C.C. No. 817 of 1941.

T. S. Venkataraman for Petitioners.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioners were convicted by the Stationary Sub-Magistrate of Gudiyattam in C.C. No. 817 of 1941. They appealed to the Joint Magistrate of Tirupathur, who released them on bail pending the appeal. On the date to which the appeal was posted for hearing neither the petitioners nor their counsel were present. The Joint Magistrate thereupon delivered what he described as a judgment. After saying that they had been convicted under certain sections and had been sentenced to certain terms of imprisonment, he proceeded:

"Both the appellants are absent when called. Their vakil too is absent and has not even submitted an application for adjournment. I have carefully perused the case record, and do not find any grounds to interfere with the judgment of the lower Court. The appeal is dismissed."

The above order would have been unexceptionable if the appeal had been dismissed *in limine* under section 421 of the Criminal

*Crl.R.C. No. 641 of 1941 17th September, 1941.
(Crl.R.P. No. 603 of 1941).

Chinnathambi, *In re.*

Procedure Code; but it is clear that the appeal was not dismissed under that section. Notice went to the Public Prosecutor and the petitioners were released on bail pending the appeal. It was therefore disposed of under section 424 of the Criminal Procedure Code, and it is there laid down that as far as the judgment in appeal is concerned the rules contained in Chapter XXVI apply. Section 367 (1) which is in Chapter XXVI requires that

> "Every such judgment shall . . . . be written . . . . and shall contain the point or points for determination, the decision therein, and the reasons for the decision . . . ."

It is thus seen that it is necessary for the appellate tribunal, as well as the trial Court, to give its reasons for coming to the conclusion it does. The Joint Magistrate not having done that, his order is invalid.

The petition is therefore allowed and the appeal remanded to the Joint Magistrate of Tirupathur for fresh disposal after giving due notice to the Crown and to the petitioners. The appellants will be allowed to remain on bail on the same terms as before.

K. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Bonthu Appadu and others .. *Petitioners** *(Accused—Applts).*

Appadu, *In re.*

Criminal Procedure Code (V of 1898), section 367—Disregard of provisions—Effect.

Whether a disregard of the provisions of section 367 of the Criminal Procedure Code is irregular or illegal, it is undoubtedly a grave irregularity.

II Weir 439, doubted.

It is even more essential that an appellate Court should give reasons for its orders than that the trial Court should do so; for in the latter case the accused has a remedy by way of appeal before a tribunal which has to consider questions of fact as well as of law. In revision, on the other hand, findings of fact are ordinarily accepted. Where a Magistrate died after the hearing of a case and no judgment was ever written and there was doubt whether it was really even pronounced interests of justice require that the appeal should be heard again.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate of Vizianagaram in C.A. No. 74 of 1941 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Vizianagaram in C.C. No. 139 of 1939.

S. Suryaprakasam for Petitioners.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioners were convicted by the Stationary Sub-Magistrate of Vizianagaram of an offence punishable under section 147, Indian Penal Code, and ordered to pay fines of Rs. 25 each. They took the matter in appeal to the Sub-Divisional Magis-

*Crl.R.C. No. 940 of 1941 (Crl.R.P. No. 886 of 1941). 4th March, 1942.

trate of Vizianagaram, who heard the appeal on 3rd January, 1941. He made notes of the arguments, and those notes show that the arguments were completed on that day. The case was then adjourned to 6th January, 1941, at Vizianagaram. Of what happened on 6th January, 1941, one cannot be quite sure; but the docket, which was written by a clerk, notes that the conviction and sentence were confirmed on 6th January, 1941. There was no note however by the Magistrate that he disposed of the case on 6th January, 1941, and nothing in his own hand to indicate what he did on that day. The affidavit of the pleader is to the effect that arguments were heard on 6th January, 1941, but that is not consistent with the entries made by the Magistrate himself. However that may be, no judgment was ever written. About six weeks later, the Magistrate was taken ill and eventually died. When the petitioners applied for copies of the judgment they were told that no judgment existed. The petitioners have therefore filed a petition praying that the matter be reheard. Appadu, *In re.*

The learned Public Prosecutor has shown me a case, II Weir 439, to the effect that disregard of the provisions of section 367 of the Criminal Procedure Code is irregular but not illegal. I doubt whether that is the present opinion of this Court, but however that may be, there was undoubtedly a grave irregularity. It is even more essential that an appellate Court should give reasons for its orders than that the trial Court should do so; for in the latter case the accused has a remedy by way of appeal before a tribunal which has to consider questions of fact as well as of law. In revision, on the other hand, findings of fact are ordinarily accepted. Moreover, in this case there is some doubt whether the judgment (even if we overlook the lack of a written judgment) was really pronounced on 6th January, 1941. If it had been, one would have expected a note by the Judge to that effect. As this Court must be satisfied that the appeal was properly disposed of as well as heard, the interests of justice require that the appeal should be heard again.

The order of the appellate Court confirming the conviction and sentence is therefore set aside and the appeal remanded to the Joint Magistrate of Vizianagaram for rehearing and fresh disposal.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The Public Prosecutor .. *Appellant**

v.

Murthujakhan Sahib .. *Respondent* (*Accused*).

Public Prosecutor *v.* Murthujakhan Sahib.

Madras Local Boards Act (*XIV of* 1920), *sections* 159 (1) *and* 207 (1) —*Disobedience of a lawful notice to remove an encroachment—Acquittal—No bar to conviction for subsequent disobedience of a similar order—Adverse finding on question of title in Criminal Court—Proper course for Local Board is to establish the title in Civil Court.*

Where an accused was charged for disobeying a lawful notice of the District Board to remove an encroachment,

*Crl. Appeal No. 772 of 1941. 4th March, 1942.

Public Prosecutor *v.* Murthujakhan Sahib.

Held, that a previous acquittal of the accused for the disobedience of a like notice in the previous year was no bar to the filing of the subsequent complaint. Although the District Board was not barred from preferring the subsequent complaint, they should have accepted the finding in the prior criminal proceedings and not availed themselves of their technical right to have the same matter reagitated in another Criminal Court. The proper course for a responsible body like a Local Board would be, after an adverse finding by a Criminal Court on a question of title, to seek to establish that title in a Civil Court.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Sub-Divisional First Class Magistrate of Dharmapuri in Criminal Appeal No. 39 of 1941 on his file (C.C. No. 1092 of 1940, Stationary Second Class Magistrate's Court, Dharmapuri).

A. S. Sivakaminathan for Appellant.

C. S. Swaminathan for Respondent.

The Court delivered the following

JUDGMENT.—The accused was charged under section 159 (1) read with section 207 (1) of the Madras Local Boards Act for disobeying a lawful notice of the District Board of Salem to remove an encroachment. He was duly convicted by the Sub-Magistrate of Dharmapuri and on appeal, the Sub-Divisional Magistrate, Dharmapuri, set aside the conviction on two grounds. The first was purely on a question of fact; and he came to the conclusion that there had been no encroachment. Secondly, he held that a previous acquittal for the disobedience of a like notice in 1939 by the Panchayat Board was a bar to a conviction in the present case. The Crown has appealed.

On the point of law the Magistrate is clearly wrong. The offence that the accused was alleged to have committed in 1939 was not the offence for which he has been charged now. The offence in both cases consisted of disobeying a particular order; but the order disobeyed in the present case was not the order that the accused disobeyed in 1939. So the offence was not the same and he was not therefore acquitted of the same offence in 1939. This matter was brought before this Court in revision in this very case during the trial before the Sub-Magistrate, and the revision petition filed by the accused was dismissed.

I do not think that the Crown would have preferred the present appeal had the Sub-Divisional Officer not erred on this point of law. It is not usual for the Crown to prefer an appeal against an appellate judgment on a point of fact unless the judgment is perverse. The prosecution still contends that the Magistrate did not properly consider the real points in dispute; but where there is evidence on both sides regarding a civil right, the matter is better decided in a Civil Court. Although the District Board was not barred from preferring the present complaint, I think they should have accepted the finding in 1939 and not availed themselves of their technical right to have the same matter re-agitated in another Criminal Court. One would expect a responsible body like a Local Board, after an adverse finding by a Criminal Court on a question of title, to seek to establish that title in a Civil Court. It would not be right to harass the same

person again and again in Criminal Courts on the same question. Public Prosecutor v. Murthujakhan Sahib.

The appeal is dismissed.

K. S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

Chennakesava Aiyangar .. *Appellant** (*Respondent*)

v.

The Official Liquidator, The Coimbatore Mahalakshmi Bank, Limited .. *Respondent* (*Petitioner*).

Chennakesava Aiyangar v. Official Liquidator.

Companies Act (VII of 1913), section 231—Resolution for voluntary winding up followed by a petition for winding up by or subject to supervision of Court—Act of insolvency—Determining date—Assignment within three months of resolution but beyond three months of petition—If can be set aside.

When a voluntary winding up is followed by a compulsory winding up by the Court, the former is superseded on account of the inconsistency between the provisions which relate to the two forms of winding up. In such a case the presentation of the petition for winding up by the Court and not the earlier resolution for voluntary winding up shall be deemed to be the act of insolvency.

Re *Russell Hunting Record Co., Ltd.,* (1910) 2 Ch.D. 78, relied on.

Accordingly an assignment by the company made more than three months before the petition for compulsory winding up by the Court, though within three months of the resolution for voluntary winding up, cannot be said to be a fraudulent transfer avoidable under section 231 of the Companies Act.

Appeal against the order of the District Court of Coimbatore, dated 29th July, 1940, and made in I.A. No. 795 of 1939 in O.P. No. 175 of 1939 on the file of the High Court, Madras.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

Respondent not represented.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.

Krishnaswami Ayyangar, J.—This is an appeal from an order of the District Judge of Coimbatore holding that an assignment in favour of the appellant made on 2nd March, 1939, by the Mahalakshmi Bank, Limited, now in liquidation, was a fraudulent preference. The question was considered by the learned Judge under two heads and on two different dates. First, he considered the question whether the assignment which has been impugned was within three months of the act of insolvency. Section 231 of the Indian Companies Act which applies the principle of fraudulent preference enacted by section 54 of the Provincial Insolvency Act to companies states as follows:

"(1) Any transfer, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his insolvency a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly.

(2) For the purposes of this section the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court and a resolution for winding up in the case of a voluntary

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*A.A.O. No. 115 of 1941. .. 29th July, 1942.

Chennakesava Aiyangar *v.* Official Liquidator.

Krishnaswami Ayyangar, J.

winding up, shall be deemed to correspond with the act of insolvency in the case of an individual.''

In the present case, there was an extraordinary resolution for the voluntary winding up of the company on 20th April, 1939. If this date is to be taken as the crucial date for the determination of the period of three months, then the assignment in question will undoubtedly be within the section provided of course the other conditions are satisfied. According to the learned Judge in the Court below it is that date, namely, 20th April, 1939, the date of the voluntary winding up that should be taken as the crucial date.

Clause (2) of section 231 refers to two methods by which a company may be wound up:

''(1) by the presentation of a petition for winding up in the case of a winding up by or subject to the supervision of the Court, and

(2) by a resolution for winding up in the case of a voluntary winding up''.

But the section does not clearly say which is to be deemed to be the crucial date where a voluntary winding up is followed by a petition for the winding up of the company by or subject to the supervision of the Court. This is precisely what has happened in the present case, for the resolution for the voluntary winding up of the company passed on 20th April, 1939, was followed by a petition for the compulsory winding up of the company subject to the supervision of the Court, presented on 17th June, 1939. If the latter date is to be regarded as the date from which the period of three months is to be calculated, then the assignment would be beyond the time contemplated by the section.

Whatever doubt there might appear to be on the language of clause (2) of section 231 it has been resolved by a decision of Swinfen Eady, J., in In re *Russell Hunting Record Co., Ltd.*[1] This decision proceeded upon the language of section 164 of the English Companies Act of 1862 which appears to be almost word for word the same as section 231 (2) of our Act. What happened in that case was, first there was a resolution for the voluntary winding up of the company followed subsequently by a compulsory winding up ordered by the Court. The learned Judge held that the determining date was not the date of the resolution for the voluntary winding up but the date of the presentation of the petition on which the Court directed its compulsory winding up. Referring to the decision in In re *Taurine Co.*,[2] the learned Judge explained the position by stating that the provisions of the Act left no room for doubt that when the voluntary winding up is followed by a compulsory winding up by the Court, the former is superseded altogether on account of the inconsistency between the provisions which relate to the two forms of winding up. In our opinion this decision is clear authority against the view which has been accepted by the learned District Judge. The learned Judge, it is apparent, came to make the order, which we now find to be erroneous, on account of the fact that the English decisions were not made available to him. For the reasons explained, we

1. (1910) 2 Ch.D. 78.
2. (1883) 25 Ch.D. 118.

Chennakesava Aiyangar v. Official Liquidator. — Krishnaswami Ayyangar, J.

must hold that the assignment being more than three months before the petition for the compulsory winding up by the Court, that is, before 17th June, 1939, it cannot be held to be a fraudulent preference avoidable under section 54 of the Provincial Insolvency Act.

The learned advocate for the appellant contended that the decision of the Court below is erroneous also on the merits. He argued that the evidence does not warrant the finding that the Bank had the intention to prefer the appellant. But we are not prepared to differ from the view taken by the learned Judge. The evidence leaves no room for doubt that there were a number of creditors of whom two at least were left unheeded while the appellant and certain other creditors were satisfied by the assignment of promissory notes or other valuable securities. This is sufficient to justify the finding that there was on the part of the bank an intent to prefer.

In the result the appeal is allowed with costs here and in the Court below.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Thotapalli Dharmayya .. *Petitioner**
(*Petitioner—Judgment-debtor*)

v.

Nelabarla Yanadi Reddy .. *Respondent*
(*Respondent—Decree-holder*).

Dharmayya v. Yanadi Reddy.

Madras Agriculturists' Relief Act (IV of 1938), section 20—Stay under—If can be refused or ordered subject to conditions on the ground that debtor was obstructive and using the provisions for delaying. ..

Section 20 of Act IV of 1938 does not allow the Court a discretion to refuse a stay in a case in which the conduct of the debtor has been obstructive, nor does it contain any provision for imposing conditions for the grant of stay. Section 23 contains no time limit within which the setting aside of a sale in execution under that section has to be followed by an application under section 19. There is nothing in the Act to prevent a debtor waiting after a sale in execution has been set aside to the last possible minute and then filing a stay application under section 20 just at the time when a fresh sale is being held.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the decree of the District Court of Nellore, in A.S. No. 86 of 1940 preferred against the order of the Court of the District Munsiff of Nellore, dated 6th November, 1939, and made in E.A. No. 686 of 1939 in O.S. No. 665 of 1935.

K. Umamaheswaram for Petitioner.

K. Kuppuswami for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was the judgment-debtor under a decree in a suit of 1935. On 17th March, 1938, his property was sold in execution of the decree. He took no action in the matter of the sale until after Madras Act IV of 1938 came into

*C.R.P. No. 958 of 1941. 3rd July, 1942.

Dharmayya v. Yanadi Reddy.

force when on 28th April, 1938 (not 1939 as the trial Court wrongly states) he filed an application under section 23 of that Act and got the sale set aside. Both the Courts below, misled by the error of date in the trial Court's judgment, have assumed that this application under section 23 was preceded by an application for stay under section 20. That is not the case. In the Memorandum of Appeal to the appellate Court this error was clearly pointed out, but it does not appear to have been impressed upon the learned Judge at the time of the arguments.

After the appellant had got the sale set aside in April, 1938, he took no action at all until the decree-holder, a year later, once more brought the property to sale. Then on the 25th April, 1939, the judgment-debtor filed an application for stay under section 20. While this application was pending he had ample time to move the Court under section 19, but he did not do so. Eventually the executing Court required the applicant to pay costs as a condition precedent to the grant of the stay and the stay was refused for non-payment of the costs. On the same day the sale was held and the property knocked down to the decree-holder. The trial Court, under the impression that there had been an earlier stay application under section 20 and that it was not followed by any application under section 19 to scale down the decree, refused to set aside the second sale on the ground of material irregularity. The same view was taken by the learned District Judge.

It seems to me perfectly plain that the conduct of the petitioner has been reprehensible in the extreme and that his tactics have been purely obstructive and have not indicated any desire to use the procedure laid down in the Act in the way in which it is intended. Having got the sale set aside under section 23 he should have taken steps to get the debt scaled down. Even if he had been unable to do so before the second sale proceeding was started he had ample time to file a petition under section 19 while his application under section 20 was pending. Moreover when the application under Order 21, rule 90, Civil Procedure Code, was dismissed by the trial Court under a misapprehension of the facts, the error does not seem to have been clearly put before the District Judge at the time of the arguments in the appeal although it was clearly stated in the appeal memorandum. Unfortunately section 20 of Act IV does not allow the Court a discretion to refuse a stay in a case in which the conduct of the debtor has been obstructive, nor does it contain any provision for imposing conditions for the grant of stay. Section 23 contains no time limit within which the setting aside of the sale has to be followed by an application under section 19. There is nothing in the Act to prevent a debtor from behaving as this debtor has behaved, namely waiting to the last possible minute and then filing a stay application just at the time when the second sale is being held. I am reluctantly constrained to hold that the selling Court was obliged to stay the second sale on being satisfied that the debtor was an agriculturist and that the holding of the sale in disobedience to the provisions of section 20 constituted a material irregularity which had the effect of depriving the debtor

of the benefits of the Act which would have accrued had the stay been granted so as to give him time to file an application under section 19.

It follows therefore that the sale has to be set aside. As the conduct of the debtor has been deplorable and the protraction of the litigation has been almost entirely due to his dilatory tactics, I make no order as to costs in any of the Courts.

K. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

S. Kadir Hussain Rowther and others .. *Petitioners** (*Repts.* 1, 2, 4 *and* 5)

v.

Jamila Bi and another .. *Respondents* (*Petr. and 3rd Respt.*).

Practice—Suit to obtain share of deceased's estate—Value for purposes of jurisdiction and appeal.

Where though the primary object of a suit by a co-heir is to obtain her own share of the deceased's estate, the suit must be regarded as a suit for the administration of that estate, a decree in such a suit must necessarily affect the value of the whole estate. Accordingly where the value of the estate is Rs. 41,000, though the value of the plaintiff's share will come to less than Rs. 5,000, an appeal from a decree in such a suit must be filed in the High Court and not in the District Court.

Vasireddi Veeramma v. *Butchayya*, (1926) 52 M.L.J. 381: I.L.R. 50 Mad. 646, applied.

Kattiya Pillai v. *Ramaswamia Pillai*, (1929) 56 M.L.J. 394, considered.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of Madura, dated 9th February, 1942, and made in I.A. No. 6 of 1942 in A.S. No. 8 of 1942.

T. R. Srinivasan for Petitioners.

K. Rajah Aiyar and *V. Seshadri* for Respondents.

The Court delivered the following

JUDGMENT.—This petition arises out of an appeal, A.S. No. 8 of 1942, filed before the learned District Judge of Madura from the decree in a suit filed by one of the heirs of a deceased Mahomedan. It is admitted that although the primary object of the suit is for the plaintiff to obtain her own share of the deceased's estate, the suit must be regarded as a suit for the administration of that estate. It is further conceded that the value of the estate is Rs. 41,000 or more and that the plaintiff's share will come to less than Rs. 5,000. The question which was raised as a preliminary point before the learned District Judge was whether he had jurisdiction to hear the appeal or whether the appeal should be filed in this Court. The learned Judge after discussing various cases held that there was no direct authority of the Madras High Court on this matter and decided to follow an authority of the Rangoon High Court which held that the subject-matter of the suit for purposes of jurisdiction was the value of the share claimed by the plaintiff. This petition has been filed against that decision.

*C.R.P. No. 410 of 1942. 3rd September, 1942.

Kadir Hassain Rowther *v.* Jamila Bi.

It seems to me that the Madras High Court will supply sufficient guidance for the decision of this matter without recourse being had to Rangoon. The principal case which deals with the manner in which suits in general should be valued for the purposes of jurisdiction is *Vasireddi Veeramma* v. *Butchayya*.[1] In that case the learned Judges say:

"The general principles deducible for valuation for purposes of jurisdiction where no special method of valuation has been provided by statute would seem to be, (1) that where the subject-matter of a suit is wholly unrelated to anything which can be readily stated in definite money terms, then the plaintiff, having to put some money value for the purpose of jurisdiction, must put a more or less arbitrary value, and, there being no factors in the case from which the Court can say his valuation is wrong, or dishonest, the Court will accept that valuation . . ., and (2) that where the subject-matter is so related to things which have a real money value that the relief asked for will affect these, then the value of the suit for the purpose of jurisdiction is to be taken as the market value of the property affected."

The learned Judges also give instances of types of suits which fell under both of these heads, though amongst them they did not mention either suits for partition or suits for administration. It is common ground that the present case must fall under the second head "where the subject-matter is so related to things which have a real money value that the relief asked for will affect these", the only question being whether the relief asked for affects the money value only of the plaintiff's share or the money value of the whole estate. It seems to me that this question can be very easily answered. Although the plaintiff's main object is merely to obtain her own share, an administration suit must necessarily deal with the administration of the whole estate. It provides for payments of debts, payments to legatees and the division of the estate amongst the heirs. It seems to me therefore beyond all argument that the relief asked for, that is to say, the administration of the estate, must affect the whole estate and therefore that estate being valued at Rs. 41,000 the only Court which could have jurisdiction to hear an appeal is the High Court. I have been referred in answer to this to another case in Madras which has also been referred to by the learned District Judge and has been reported in *Kattiya Pillai* v. *Ramaswamia Pillai*.[2] There the suit was to set aside a will and the learned Judges observed that the value of the interest that would be lost to the plaintiff if the will were left outstanding would be the difference between the benefit he takes under the previous will relied on by him and the will he attacks in this suit. That case no doubt suggests at first sight that the decree will affect only the plaintiff's interest in the will and it might perhaps be argued that if a decree is granted setting aside a will it would also necessarily affect the interests of other persons who stand to benefit under that will. I do not think however that I need regard this as any authority binding upon me or in any way necessarily inconsistent with 50 Madras or with my application of 50 Madras to the present facts because I find that in *Kattiya Pillai* v. *Ramaswamia Pillai*,[2] it was not necessary for the learned Judges to decide this

1. (1926) 52 M.L.J. 381; I.L.R. 50 Mad. 646.
2. (1929) 56 M.L.J. 394.

particular question, namely, whether the decree to be granted would affect the plaintiff's interest in the will only or the whole property conveyed by the will. In either case the suit was beyond the jurisdiction of the District Munsiff. That decision therefore is not based upon the application of any principle which is at variance with what I have now said, namely, that in a suit for the administration of an estate the decree must necessarily affect the value of the whole estate. I am accordingly of opinion that the learned District Judge's order is not correct and must be set aside and that the appeal which has been filed can be heard only in the High Court. The respondents must pay the petitioner's costs.

Kadir Hussain Rowther *v.* Jamila Bi.

K. S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Chinnaswami Chetty .. *Petitioner** (*Defendant*)

v.

Parvathiah Chetty .. *Respondent* (*Plaintiff*).

Chinnaswami Chetty *v.* Parvathiah Chetty.

Madras Agriculturists' Relief Act (IV of 1938), section 20, Proviso—Decree scaled down on application made beyond sixty days of stay order—Execution of decree—If to be as it stood on date of stay or on date of execution.

Where after a decree had been scaled down on an application by the judgment-debtor made subsequent to the lapse of sixty days from the grant of stay, the decree-holder sought to execute the decree as it stood before its amendment,

Held: The words "the decree shall be executed as it stands" in the proviso to section 20 of Act IV of 1938, have reference to the frame of the decree at the time of the execution having regard to any changes which it may have undergone in the trial Court, and not to the frame of the decree as it stood at the time of the stay order.

Where the decree-holder has unsuccessfully contested the application for scaling down it is no longer open to him to urge before the executing Court that the decree to be executed is the decree as it stood before the amendment. Even if the amendment was wrongly made he is bound by it.

The words "notwithstanding anything contained in the Act to the contrary" in the proviso to section 20 have reference presumably to the provisions of section 7 of the Act which prohibit the execution of a decree against an agriculturist in so far as a decree is for an amount in excess of the sum as scaled down under Chapter II. They have no application where the decree has in fact been amended before execution has actually taken place.

Accordingly execution can proceed only on the basis of the decree as amended.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Tiruvannamalai, dated 30th June, 1941, and made in R.E.A. No. 526 of 1941 in S.C.S. No. 1484 of 1934 on the file of the Court of the District Munsiff of Arni.

C. R. Rajagopalachari and *C. S. Padmanabhan* for Petitioner.

T. K. Sundararaman for Respondent.

The Court delivered the following

JUDGMENT.—This case raises a question under sections 19 and 20 of Madras Act IV of 1938 on rather peculiar facts. The

*C.R.P. No. 2270 of 1941. 23rd July, 1942.

petitioner was the judgment-debtor and when proceedings in execution were pending, he obtained an order of stay under section 20 of Act IV in August, 1939. He did not follow up that stay order with an application under section 19 within sixty days, as contemplated in the proviso to section 20. Apparently, though the facts are not on record, the judgment-debtor was taking proceedings before the Debt Conciliation Board and the pendency of these proceedings was regarded as a sufficient reason for not proceeding at once under section 19. Whatever be the reason, both parties remained inactive; the execution of the decree was abandoned and nothing was done by the judgment-debtor to get the decree scaled down until 9th September, 1940, *i.e.*, more than a year after the stay order. This application under section 19 was opposed by the decree-holder and on 27th September, 1940, the decree-holder filed a fresh execution petition praying for the execution of the decree, as it stood without any scaling down. We do not know what were the grounds on which the decree-holder opposed the application under section 19, or whether he raised the contention that the application was barred, not having been preferred within sixty days of the grant of the stay under section 20. The fact remains that on 27th November, 1940, notwithstanding the objection of the decree-holder, the decree was amended under section 19. Thereafter, the decree-holder attempted to execute the unamended decree and an objection was taken by the judgment-debtor that by reason of the amendment under section 19, the only decree which could be executed was the amended decree. The executing Court passed a considered order rejecting this contention on the 25th March, 1941. On the 17th April, 1941, the judgment-debtor, apparently seeking a more formal order, prayed for the same reasons already advanced, that the Court should inquire into the executability of the execution petition and should stay execution proceedings meanwhile. This petition was dismissed on the ground that it raised the same contentions already overruled.

A preliminary objection was taken to the revision petition on the ground that it is preferred not against the order of the 25th March overruling the objections, but against the order of the 30th June declining to reconsider the previous order. It seems to me that what the petitioner substantially seeks to get revised is the lower Court's decision that his objections are invalid. If, however, he was wrong in treating the first order as a mere finding and asking for a definite decision as to the executability of the petition before coming up in revision, the only result would be that the revision petition would be a little belated and in the circumstances of the case, I have no doubt that the delay could properly be excused. I am therefore treating this revision petition as a petition to revise the decision in the order of the 25th March, 1941.

Turning to the merits of the order, the trial Court reads the proviso to section 20 as containing a mandatory direction to the executing Court to execute the decree in its unamended form, notwithstanding anything which may have taken place under the

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Act in the interval between the passing of the stay order and the final process of execution. The proviso states:

"that where within 60 days after the application for stay has been granted the judgment-debtor does not apply to the Court which passed the decree for relief under section 19 . . . the decree shall be executed as it stands notwithstanding anything contained in this Act to the contrary."

I have no doubt that this clause was enacted with reference to the ordinary case in which a stay is obtained and nothing is done by the decree-holder before execution is sought to be taken after the 60 days period has elapsed. The words "notwithstanding anything contained in this Act to the contrary" presumably have reference to the provisions of section 7 which prohibit the execution of a decree against an agriculturist in so far as a decree is for an amount in excess of the sum as scaled down under Chapter II. They are not in my opinion intended to refer to circumstances such as those with which we are now confronted where the decree has in fact been amended before execution has actually taken.

Assuming that the proviso of section 20 did not contemplate the present facts, it remains to be seen what is the effect of applying to the undoubted facts the procedure laid down in section 20. The lower Court has read the words "shall be executed as it stands" as having regard to the condition of the decree, not at the time of execution, but at the time of the stay proceedings; that is to say, the lower Court reads these words as if they were "the decree shall be executed as it stood when the stay was ordered." I doubt very much whether this is the correct grammatical construction of the words. In plain English, the words "shall be executed as it stands" would, in my opinion, mean, "shall be executed as it stands at the time of execution" and not as it stood at some anterior date. If the word "stands" were to relate back to some anterior date, the past tense ought to have been used. Moreover the construction placed upon these words in the lower Court involves the difficulty that the executing Court would be required to ignore any amendment of the decree which might have taken place in the trial Court in the interval between the granting of the stay and the execution of the decree, even if that amendment were an amendment passed under the Civil Procedure Code. It seems to me that the view taken by the lower Court ignores the basic principle that the executing Court cannot go behind the decree as issued by the trial Court. If the trial Court amends the decree while the execution petition is pending, the executing Court cannot, when the amendment has been brought to its notice, proceed with the execution of the decree as it stood before the amendment. It is the trial Court and trial Court alone which can decide what is precisely the decree which the executing Court has to execute.

On these considerations I am constrained to hold that the words "the decree shall be executed as it stands" have reference to the frame of the decree at the time of the execution, having regard to any changes which it may have undergone in the trial Court, and not to the frame of the decree as it stood at the time of

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the stay order. I am fortified in this conclusion by reference to what happened in the present case. The decree-holder had notice of the application under section 19 and he contested that application. On the strength of the decision in *Kumaraswami* v. *Thiruvengadathan*,[1] he could presumbly have contended that the application was barred not having been filed within 60 days of the grant of the stay under section 20. Whether he did raise such an objection or not, we do not know. There is also a possibility that some contention may have been taken based on section 14 of the Limitation Act with reference to the proceedings alleged to have taken place before the Debt Conciliation Board. That however is only a conjecture. We do know that the decree-holder objected to the amendment of the decree under section 19 and that his objection was overruled. In my opinion it is no longer open to him to urge before the executing Court that the decree to be executed is the decree as it stood before the amendment. Even if the amendment was wrongly made, he is bound by it.

In this view I allow the revision petition and direct execution to proceed on the basis of the decree as amended. The decree-holder will pay the costs of the revision petition.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Vemireddi Rangareddi .. *Appellant** (*Plaintiff*)

v.

Isaka Venkatareddi and others .. *Respondents* (*Defendants*).

Vemireddi Rangareddi *v.* Venkatareddi.

Madras Agriculturists' Relief Act (*IV of* 1938), *sections* 3 (i) *and* (v) *and* 8—"*Joint composite families*"—*If "person" as defined in section* 3 (i)—*Section* 3 (v)—*Informal assignment not sufficient to bring assignee within definition of "creditor"—Successive managers of "composite joint families"—Cannot be "same creditor" within the meaning of that expression in the explanation to section* 8.

Where it was alleged that a debt was incurred in 1922 when a mortgage deed was executed in favour of *X* as the manager of the joint composite family of which the plaintiff was a member and that after *X's* death in 1934 a new mortgage deed was taken in the name of the plaintiff who was stated to have become the manager of the family, on the question of the debtor's right to claim relief under Madras Act IV of 1938,

Held: The association known as the composite family, the existence of which by custom has been recognised in the Nellore and adjacent districts, cannot properly be termed "an undivided Hindu family" such as is recognised as a "person" in the definition in section 3 (*i*) of Madras Act IV of 1938. That definition includes under the category of "persons" an undivided Hindu family, a marumakkattayam or aliyasantana tarwad or tavazhi and excludes other associations. In section 3 (*v*) when the definition of "creditor" was made to include his "heirs, legal representatives and assigns", the legislature must be presumed to have intended to refer to those who were the legal heirs or the legal assigns and not to persons who claimed to have acquired rights in a manner which the law does not recognise. Accordingly the debt cannot be scaled down on the basis of the

1. (1939) 2 M.L.J. 308: I.L.R. (1939) Mad. 886.

*Appeal No. 12 of 1940. 17th August, 1942.

earlier mortgage on any theory that the creditor under the first mortgage was an association known as the composite family and the creditor under the later mortgage was the same association.

Vemireddi Rangareddi *v.* Venkatareddi.

Appeal against the decree of the District Court of Nellore, dated 6th April, 1939, and passed in O.S. No. 19 of 1937.

D. R. Krishna Rao for Appellant.

K. Umamaheswaram for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The appellant was the plaintiff in a suit on a mortgage Ex. A, dated 29th January, 1934, executed by defendants 1 and 2 in favour of the plaintiff for a sum of Rs. 26,730-10-0. The suit was instituted before Act IV of 1938 came into force. When that Act became operative an additional written statement was filed, in which it was contended that the suit debt was originally incurred in January, 1922, when an earlier mortgage deed was executed in favour of one Venku Reddi, the manager of the joint composite family of which the plaintiff was a member, that after Venku Reddi's death plaintiff became the manager of the composite family and that the suit mortgage deed was taken in the name of the plaintiff as such manager in renewal of the earlier mortgage deed. The learned Judge has found that the plaintiff was in fact the assignee of the original mortgagee because it appears that one debt was executed in discharge of the other debt and because the plaintiff alleged that he got the debt as a consequence of Venku Reddi's family owing him money and was given Ex. B, that is, the earlier mortgage and some other documents to discharge those debts. The learned Judge finds that on the plaintiff's own assertions he is an assignee of this debt even without any document of assignment and referring to the definition of a "creditor" in section 3 of Act IV of 1938 he holds that the plaintiff being the assign of the original creditor is the same creditor. It seems to us that the reasoning of the learned Judge is fallacious. When the definition of "creditor" was made to include his heirs, legal representatives and assigns, the Legislature must be presumed to have intended to refer to those who were the legal heirs or the legal assigns and not to persons who claimed to have acquired rights in a manner which the law does not recognise. If the debt under the earlier mortgage Ex. B was in some informal way made over to the plaintiff before the second deed was executed in his name, he could not by virtue of this informal transfer be deemed to be the assign of the previous mortgagee or of the latter's legal representative.

Owing to the view which the learned District Judge took of the effect of the plaintiff's own contentions, he did not go into the defence based on the alleged existence of a composite family of which first Venku Reddi and subsequently the plaintiff were the managers. We do not know whether in fact there is a composite family or whether the contract of mortgage was with the plaintiff as manager of any composite family and not in his capacity as an individual or a member of an ordinary joint family. We are, however, of opinion that the association known as the composite family, the existence of which by custom has been

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recognised in the Nellore and adjacent districts, cannot properly be termed "an undivided Hindu family" such as is recognised as a person in the definition in section 3 (*i*) of Act IV of 1938. That definition includes under the category of "persons" an undivided Hindu family, a marumakattayam or aliyasantana tarwad or tavazhi and excludes other associations. Although the organisation of the composite family of the Nellore district may be in many respects analogous to that of an undivided Hindu family, we cannot hold that the composite family is an undivided Hindu family. It is something different from that which is known to Hindu law as an undivided Hindu family, even though in many of the customary features of the composite family, a marked similarity to the legal incidents of an undivided Hindu family may be established.

It seems to follow that it is not open to the defendants to get the decree scaled down on the basis of the earlier mortgage on any theory that the creditor under the first mortgage was an association known as the composite family and the creditor under the later mortgage was the same association. But Mr. Umamaheswaram has contended that even granting so much it might be open to him to show that the mortgagee in each case was the representative according to custom of the individual undivided families which are the component parts of the composite family and that the contract was entered into with him in that capacity and was really a contract with the lesser families making up the composite family acting through their representative and that since the same families were represented in the manner prescribed by custom in both documents, the creditors were the same. We find it difficult to express any opinion on the merits of this contention, when no evidence has been recorded either as to the existence of the composite family in question or as to the customary status of the manager of such a family or as to the way in which the contracting parties regarded the mortgagee in his relation to the composite family or to the minor groups included therein. We think it, therefore, better to remand the case for the recording of such evidence as may be adduced on the question whether the two mortgages were both executed with the mortgagee as the representative of the same Hindu undivided families forming together a composite family, and if so, whether the defendants are entitled to have the debt scaled down under section 8 on the basis of the original principal in Ex. B.

There is a memorandum of cross-objections filed on behalf of the defendants which raises two questions. One is whether two payments, made under Ex. B the earlier mortgage and credited at the time when the later mortgage was executed, can be treated as open payments available in reduction of the principal as on 1st October, 1937. If the disposal of the remanded enquiry results in a decision that section 9 of the Act applies, this contention would not of course have any force. But it seems to us that it is clearly untenable in the light of the decisions of this Bench. When these two payments were adjusted to the debt in order to calculate the amount for which the later document was executed, it could no longer be contended that they were unappropriated

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and the debtor would have to show that they were appropriated in such a way as is beneficial to himself, which he cannot do. The other question raised in the memorandum of cross-objections relates to the calculation of the advocate's fee. It is suggested that the advocate's fee should be calculated on the amount as scaled down and not on the amount which would legitimately have been decreed, had it not been for the operation of Act IV of 1938. Under the provisions of section 18 when a suit is filed after the 1st October, 1937, the Court must allow costs on the basis of the debt as scaled down. The corollary of this provision of law, is that when a suit is filed before the 1st October, 1937, costs should legitimately be allowed on the basis of the decree which would have been passed had it not been for the intervention of Act IV of 1938. The memorandum of cross-objections is therefore dismissed with costs and the appeal is allowed and the suit is remanded for fresh disposal in the light of this judgment after hearing such evidence as may be adduced. Costs in the appeal and in the trial Court will abide by the result. The court-fee on the memorandum of appeal will be refunded.

We wish to add that nothing in this judgment will prevent the plaintiff from establishing the truth of his contention that the mortgage, Ex. A, though a *novatio* of Ex. B, is not a renewal of the same debt, in the technical sense.

Appeal allowed and memorandum of cross-objections dismissed.

K.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Ramaswamy Goundar and another .. *Appellants** *(Plaintiffs)*

v.

Ramaswami Goundar and others .. *Respondents* *(Defendants)*.

Ramaswamy Goundar v. Ramaswami Goundar.

Madras Estates Land Act (I of 1908), section 20 (2)—Suit under—Scope—Beds of tanks—Right of landholder to cultivate—Sections 20-A and 21—Not applicable.

Though an application under section 20 of the Madras Estates Land Act must be confined to the question whether the land is or is not of the description mentioned in sub-clause (*a*), (*b*) or (*c*) of clause (16) of section 3 or to a question with regard to customary rights in the user of the land, there is no reason why a person who files a suit under sub-section (2) of section 20 to challenge an order passed by the Collector under sub-section (1) should not advance a plea that he possesses the right claimed on another ground as well, for instance, as an incident of his proprietorship.

Where the proprietary rights of the landholders in the tank beds are unaffected by custom the ryots of the village have no interest in the land apart from the right to use, for the purpose of cultivating their holdings, the water contained on the land. Accordingly the landholders are entitled to cultivate such parts of the bed of the tank as become exposed when the water recedes in the dry season provided that the cultivation does not prevent the water spreading when the rains come. Neither section 20-A nor section 21 has application to the case.

Even the omission in section 20 (by the 1934 amendment) of the statement that "nothing in it should apply to tank beds in an estate or affect

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*Appeal No. 225 of 1940. 19th August, 1942.

Ramaswamy Goundar *v.* Ramaswami Goundar.

the rights of the landholder over them", does not affect the landholder's rights as a proprietor.

Appeal against the decree of the Court of the Subordinate Judge of Salem, dated 20th September, 1939, and passed in O.S. No. 57 of 1938.

K. V. Ramachandra Aiyar for Appellants.

R. Desikan for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellants are the landholders of the Piranthakam Mitta in the Salem district. They filed the suit out of which this appeal arises to establish the right which they claim to cultivate the bed of the tank in the Piranthakam village when the tank becomes dry in the hot weather. The respondents who are ryots deny that the appellants possess this right and their plea has been accepted by the Subordinate Judge. The appeal is from the decree of the trial Court dismissing the appellants' suit.

In 1937 the respondents applied to the Deputy Collector under the provisions of section 20 of the Madras Estates Land Act, for an order declaring that they possessed the following rights: (1) to graze their cattle on the land forming the bed of the tank; (2) to cut for the purpose of fuel shrubs growing there; and (3) to remove silt. They also asked for an order restraining the appellants from cultivating the land. The Deputy Collector held that the respondents had none of the rights claimed by them, but he accepted their contention that the appellants were not entitled to cultivate the land, although they did possess the right to use it for grazing.

The respondents accepted the order of the Deputy Collector, but the appellants did not and consequently they filed the present suit. In the trial Court the appellants based their case on two grounds. In the first place they claimed the right to cultivate the land as the owners of the bed of the tank and in the second place they claimed the right by custom. Section 20 of the Madras Estates Land Act has reference to customary rights and before the Deputy Collector both sides relied on custom. The Subordinate Judge held that the appellants could not claim the right to cultivate merely because they were the proprietors of the bed of the tank. In his opinion this right only arises by custom and there was no such custom. The appellants accept the finding of the Subordinate Judge that they cannot claim the right by virtue of custom, but say that he erred in rejecting their first plea.

The definition of "ryoti land" is given in section 3 (16) and it is there expressly stated that "ryoti land" does not include beds of tanks. The amending Act of 1934 in some respects changed the definition of "ryoti land," but in the Act as it originally stood and in the Act as now amended tank beds are excluded from the definition. The proprietary rights of Zamindars in the bed of the tanks lying within their estates has been recognised by the Privy Council in two cases. See *Madras*

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Railway Co. v. *Zamindar of Carvatenagarum*[1] and *Prasad Rao* v. *Secretary of State for India.*[2] The learned advocate for the respondents has very properly conceded that the bed of the tank with which the appeal is concerned is vested in the appellants as the landholders. Section 20 of the Act reads as follows:

> "20 (1) The Collector may, on the application of the landholder or other person interested, decide any question as to whether any land is or is not of the description mentioned in sub-clause (*a*), (*b*) or (*c*) of clause (16) of section 3, or as to the customary rights in the user of any land which is of any such description, as existing at the commencement of this Act.
>
> (2) Any person aggrieved by such decision may within a period of one year from the date thereof institute a suit in the Civil Court to establish the right claimed by him in respect of such land but subject to the result of such suit, if any, the Collector's decision shall be final."

It is sub-clause (*a*) of clause (16) of section 3 which excludes beds of tanks from the definition of "ryoti land". It will be observed that an application under section 20 must be confined to the question whether the land is or is not of the description mentioned in sub-clause (*a*), (*b*) or (*c*) of clause (16) of section 3 or to a question with regard to customary rights in the user of the land.

The Collector's decision on such questions is final, subject to the decision in a suit filed under sub-section (2). This does not, however, mean that a landholder is precluded from filing a suit under the provisions of the Code of Civil Procedure to establish a right which does not fall within the contemplation of section 20 of the Madras Estates Land Act, and we see no reason why a person who files a suit under sub-section (2) of section 20 to challenge an order passed by the Collector under sub-section (1) should not advance a plea that he possesses the right claimed on another ground as well. Otherwise it would mean that there would have to be two separate suits, which would involve further costs and the waste of public time. The learned advocate for the respondents did not contest this proposition. He opposed the appeal on the ground that section 20-A and section 21 operate to prevent a landholder cultivating the bed of a tank which has become dry.

In our opinion neither section 20-A nor section 21 has application here. Section 20-A merely says that subject to such rules as the Provincial Government may prescribe the Collector, on the application of the landholder, a ryot or any other person interested, may declare that land which is set apart for any of the purposes referred to in sub-clauses (*a*) and (*b*) of clause (16) of section 3 is no longer required for its original purpose and by an order in writing may direct that the land be used for another specified communal purpose or if it is not required for a communal purpose that it be converted into Government ryotwari land or landowner's ryoti land according to whether the reversionary rights vest in the Government or in the landholder. The section contains a proviso that in the case of tank bed lands the

1. (1874) 1 I.A. 364 at 385.
2. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 at 903 (P.C.).

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reversionary rights in which vest in the landholder, an order under sub-clause (1) of clause (*b*) shall be made only with his consent. In this case we are not concerned with land which is no longer required for its original purpose. The tank is still in existence and there can be no cultivation until the water in it has receded in the hot weather.

Section 21 says that a person occupying lands mentioned in sub-clauses (*a*) and (*b*) of clause (16) of section 3 for a purpose other than that for which the land is set apart or contrary to the rules framed by the Provincial Government may at any time within thirty years from the commencement of the occupation be summarily evicted by the Collector in the manner provided by the Madras Land Encroachment Act, 1905, and any crop, product, construction or thing raised, erected or deposited upon the lands shall be applied to such communal purposes as the Collector may adjudge.

In *The Collector of Trichinopoly* v. *Lekkamani*[1] the Privy Council held that the affirmative words of section 2 of Madras Regulation XXV of 1802 did not give new rights to the owners of lands not permanently assessed or take away from them any rights which they possessed. Its effect was merely to vest in all zamindars an hereditary right at a fixed revenue upon the conclusion of the permanent assessment with them. Sir Barnes Peacock in delivering the judgment of the Board said:

"It is a maxim that affirmative words in a statute without any negative expressed or implied do not take away an existing right (see *Coke's* Second Institute, page 200; *Dwarris* on Statutes, page 637). There are no words declaring that no proprietary right then existed, or should thereafter be deemed to exist, except in Government, in any lands not permanently settled; and in their Lordships' opinion it was not the intention of the Legislature to pass such an enactment."

When a person owns land, he is entitled to use it for any legitimate purpose and we can find no provision in the Madras Estates Land Act which deprives the landholder of his right to utilize the bed of the tank vested in him so long as by so doing he does not interfere with the right of others. We certainly cannot regard section 21 as intended to derogate from the rights of the landholder in the land.

In *Meeralli Ambalam* v. *Rajah of Ramnad*[2] this Court held that section 20 of the Madras Estates Land Act reserved the right of the landholder to assign tank beds for cultivation but that did not mean that tank beds by being so assigned became converted into ryoti land. That case was concerned with the section before its amendment in 1934. In the section as it originally stood it was stated that nothing in it should apply to tank beds in an estate or affect the rights of the landholder over them. This statement has been omitted from the amended section, but the omission does not affect the landholder's rights as a proprietor. Of course, these rights may be affected by custom, but no custom exists here, In the earlier case of *Bolusawmy* v. *Venkatadri Appa Rao*[3]

1. (1874) 1 I.A. 282 at 306.
2. (1933) 66 M.L.J. 338: I.L.R. 57 Mad. 593.
3. (1917) 47 I.C. 594.

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this Court also held that in so far as tank beds are capable of cultivation in the dry season the rights of the landholders over them are not affected by section 20.

Now, let us sum up the position. The proprietary rights of the appellants in the bed of this tank are unaffected by custom. The ryots of the village have no interest in these lands, apart from the right to use, for the purpose of cultivating their holdings, the water contained on the land. The proprietary rights of the appellants can only be cut down by a statutory provision expressed in unambiguous language, and there is no such provision. Therefore they are entitled to cultivate such parts of the bed of the tank as become exposed when the water recedes in the dry season, provided that the cultivation does not prevent the water spreading when the rains come.

The appeal will be allowed with costs here and below.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Palani Mudali .. *Petitioner** (*1st Deft.—1st Petr.*)

v.

Athiappa Goundan *alias* Peria Goundan ... *Respondent* (*Plaintiff—Respt.*).

Palani Mudali v. Athiappa Goundan.

Madras Agriculturists' Relief Act (IV of 1938), *section* 19—*Second appeal—Dismissal of—Affirmance of decree of trial Court—Application for scaling down decree debt by person who though party to suit was not a party to appeal—Maintainability.*

When a decree has been the subject-matter of an appeal the decree of the appellate Court supersedes the decree of the Court below even though the appellate decree is one of affirmance of the decree of the Court below and does not reverse or modify it. It makes no difference to this principle whether the particular defendant affected was or was not a respondent in the appeal.

Where a second appeal which was pending when Madras Act IV of 1938 came into force was subsequently dismissed and the trial Court's decree was thereby affirmed, and a person who was a party to the suit but was not a party to the appeal or second appeal applied later to have the decree debt scaled down, under section 19 of the Act,

Held, that the application could not be entertained. The only decree to be executed being the appellate decree the trial Court will no longer have any jurisdiction to alter the superseded decree with reference to the terms of section 19. Nor could the High Court alter its own decree under section 19 as that section applies only to decrees passed before the commencement of the Act. If the defendant was entitled to any benefit under Act IV of 1938 which came into force while the appeal was pending it was his duty to get himself impleaded in the pending appeal and ask for that relief before the appellate decree was passed.

Muhammad Sulaiman Khan v. *Muhammad Yar Khan,* (1888) I.L.R. 11 All. 267 (F.B.), relied on.

Kotayya v. *Venkata Punnayya,* (1940) 2 M.L.J. 202 and *Kannabhiran Pillai* v. *Govindaswami Pillai,* (1940) 2 M.L.J. 473, considered.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Sankaridrug at Salem, dated 28th

*C.R.P. No. 1381 of 1941. 17th July, 1942.

Palani Mudali *v.* Athiappa Goundan.

October, 1940, and made in I.A. No. 747 of 1940 in O.S. No. 943 of 1930.

K. Parasurama Aiyar for Petitioner.

N. C. Vijayaraghavachariar and *N. C. Srinivasan* for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was the 1st defendant in a suit on a mortgage. The other defendants were his sons. The trial Court gave a decree against the 1st defendant and against the family properties in the hands of the sons to a certain extent. This decree was passed in 1931. An appeal was preferred by the plaintiff against the disallowance of a portion of his claim as against the sons. The 1st defendant against whom the decree had been passed in full was not given notice of this appeal and he did not himself question the decree. That appeal was allowed and a second appeal was preferred to this Court by one of the sons. In that appeal also no notice was taken to the 1st defendant the decree against whom was not in question. The second appeal was pending when Act IV of 1938 came into force and judgment was delivered on the 19th October, 1938. Since that judgment has been delivered a final decree in accordance with the terms of the preliminary decree as amended in second appeal has been passed. The 1st defendant took no action to get any relief under Act IV of 1938 until the present application was filed in 1940. The nature of this application was one under section 19 of Act IV of 1938 to scale down the trial Court's decree passed against the 1st defendant. The application has been dismissed on the ground that the appellate Court's decree having been passed after the Act came into force the 1st defendant has forfeited any rights which he may have had by not urging those rights in the pending appeal. The decisions in *Kotayya* v. *Venkata Punnayya*[1] and *Kannabhiran Pillai* v. *Govindaswami Pillai*[2] are quoted by the lower Court.

It is argued here that since the 1st defendant was not impleaded in the second appellate Court he was not obliged to raise any contention open to him in that Court and can now apply to scale down the only decree passed against him, namely, the decree of the trial Court. It seems to me that this argument is unsound. As was pointed out by the Full Bench of the Allahabad High Court in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan*[3] when a decree has been the subject-matter of an appeal the decree of the appellate Court supersedes the decree of the Court below even though the appellate decree is one which merely affirms the decree of the Court below and does not reverse or modify it. The same decision has pointed out that the only decree which can be amended is the decree to be executed and the decree to be executed is the decree of the appellate Court and not the decree of the Court below. The learned Judges go on to hold that an application under the Civil Pro-

1. (1940) 2 M.L.J. 202.
2. (1940) 2 M.L.J. 473.
3. (1888) I.L.R. 11 All. 267 (F.B.).

Palani Mudali *v.* Athiappa Goundan.

cedure Code to amend the decree can only be entertained by the appellate Court. Applying the principles of that decision, which has been repeatedly followed by this High Court, to the present case, it follows that the only decree which can be executed is the decree of this Court in second appeal or rather the final decree passed in pursuance of that decree. The trial Court's decree has been superseded not merely to the extent to which it has been altered but *in toto.* The portion of this Court's decree affirming the trial Court's decree takes the place of the decree affirmed and the portion of this Court's decree altering the trial Court's decree replaces the portion of the decree altered. It seems to me that it makes no difference to this principle whether a particular defendant was or was not a respondent in the appeal. Under Order 41, rule 33, Civil Procedure Code, the Court has jurisdiction to alter a decree in favour of a party who is not a respondent in the appeal. It could have no such jurisdiction unless the decree as a whole was the subject-matter of the appeal, although of course it cannot pass an adverse order in the absence of one of the parties affected. When this Court passed its decree in second appeal, it affirmed the decree against the 1st defendant. By so doing it did nothing adverse to the 1st defendant who had submitted to the decree and preferred no appeal against it. If the 1st defendant was entitled to any benefit under the new Act which came into force while the appeal was pending it was in my opinion his duty to get himself impleaded in the pending appeal and ask for that relief before the appellate decree was passed. On the facts of the present case it is highly probable that he knew all about the pendency of this second appeal. But whether he knew about it or not, the decree of the trial Court ceased to have any force of itself after the appellate decree was passed and the only decree to be executed being the appellate decree, the trial Court would no longer have any jurisdiction to alter the superseded decree with reference to the terms of section 19 of Act. Nor could this Court alter its own decree under section 19, as section 19 applies only to decrees passed before the commencement of the Act.

In this view I agree with the decision of the lower Court and dismiss the petition with costs.

B. V. V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Asiatic Government Security Life Assurance Co., Ltd., Bangalore *v.* Debt Conciliation Board, Erode.

The Asiatic Government Security Life Assurance Company, Limited, Bangalore .. *Petitioner**

v.

The Debt Conciliation Board, Erode by its Chairman and another .. *Respondents.*

Madras Debt Conciliation Act (XI of 1936), section 9—Duty of conciliation board to dismiss without delay an application for conciliation when it is clear that there is no hope of settlement.

*C.M.P. No. 1800 of 1942. 18th September, 1942.

Asiatic Government Security Life Assurance Co., Ltd., Bangalore v. Debt Conciliation Board, Erode.

When on the date fixed by the Debt Conciliation Board for hearing objections to a debtor's application for settlement of his debts, a mortgagee decree-holder, to whom more than fifty per cent. of the total amount was owed by the debtor appeared before the Board, stated that he objected to the Board making any order of settlement and made it clear that a settlement was not practicable and there was no ground for hoping that a settlement might be effected, the Board should have dismissed the petition at once under section 9 and not have delayed the disposal of the application by adjourning it and directing statements to be filed by the creditors giving a long period of more than three months for that purpose. Nor was it proper for the Board to make further long adjournments after the statements were filed and the Board had before it all the materials required for taking action under section 9.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling upon the 1st respondent herein to submit to this Court the records relating to the Debt Conciliation Board Application No. 23 of 1941 on the file of the Court of the Debt Conciliation Board, Erode, Coimbatore district, and to quash the order of the Board if any refusing to dismiss the application of the 2nd respondent and adjourning the matter for further inquiry and to quash the proceedings before the Board as being without jurisdiction.

V. Rajagopalachari for Petitioner.

N. Somasundaram for Respondents.

The Order of the Court was delivered by

Leach, C.J.

The Chief Justice.—This case discloses another example of the maladministration of the Debt Conciliation Act.

On the 26th December, 1939, the petitioner obtained a mortgage decree against the 2nd respondent for the payment of the sum of Rs. 6,760, inclusive of interest and costs. The judgment-debtor filed an appeal to this Court and asked for a stay of execution. A stay was granted on terms which were not complied with. Consequently the application for stay was dismissed. The trial Court eventually passed a final decree and the petitioner applied for the sale of the hypotheca. The sale was fixed for the 3rd December, 1941. Eight days before, the 2nd respondent applied to the Debt Conciliation Board of Erode for settlement of his debts. The Board intimated to the debtor and his creditors that it would hear objections to the application on the 20th December, 1941. The petitioner appeared before the Board and stated that he objected to the Board making any order of settlement. By that time there was due to him Rs. 7,400. There were four other creditors and the total amount due to the creditors was Rs. 12,040. Therefore the amount due to the petitioner was more than fifty per cent. of the total amount owed by the 2nd respondent. The petitioner was a secured creditor and had obtained a mortgage decree. In the circumstances, it is not surprising that he objected to the application which was obviously made for the purpose of delaying payment.

Under section 9 of the Act the Board has power at any stage to dismiss an application if it considers that it is not desirable or practicable to effect a settlement. The petitioner had made it

clear to the Board that a settlement was not practicable; but instead of applying the provisions of section 9 and dismissing the application, the Board directed a notice to issue under section 10 (1). This notice was issued on the 12th February, 1942, and the creditors were required to submit their statements by the 14th May, 1942. Why the Board should give such a long period for the filing of statements does not appear, but it should not have done so as it was merely helping the 2nd respondent in delaying the payment of the monies he owed. The petitioner filed the statement required by section 10 (1) on the 18th April, 1942. The Board had then before it all the materials required for taking action under section 9, but it did not do as it should have done; instead it adjourned the case until the 16th June, 1942, and on that date again adjourned the matter until the 29th July, 1942.

The Board, if it had any regard for its duty, would have dismissed the petition at the outset. It has filed a report offering the excuse that it hoped a settlement might be effected. As we have indicated, there was no ground for any such hope and the action of the Board in delaying the disposal of this debtor's application is most regrettable. The Board will be directed to pass an order forthwith dismissing the 2nd respondent's application.

The petitioner is entitled to his costs which we fix at Rs. 100 to be paid by the respondents.

K. S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Yarlagadda Rattayya .. *Appellant** (*Plaintiff*)

v.

Modumudi Co-operative Credit Society represented by its President Sanaka Rattayya and others .. *Respondents* (*Defts.* 1 *to* 3).

Madras Co-operative Societies Act (*VI of* 1932)—*Person asking for declaration that his property was not liable to be proceeded against in execution of an award and for an injunction restraining execution—Forum—Subsequent acquisition of right to execute—Injunction restraining execution, not to be granted.*

A Deputy Registrar of Co-operative Societies acting as a Sale Officer, in execution of an award passed in respect of a mortgage to the Society ordered the sale of a property which was not mortgaged and which did not belong to the mortgagor. Out of the money realised by the sale, the Co-operative Society was paid the amount due under the award and the balance was paid over to the mortgagor. The purchaser subsequently found that the property did not belong to the mortgagor and was not mortgaged to the Society and that there was a mistake in the sale and moved the Deputy Registrar to set aside the sale. The sale was accordingly set aside. The Society thereupon moved the Deputy Registrar to execute the award by proceeding against the mortgaged properties.

X who had purchased the properties comprised in the mortgage subsequent to the mortgage but without knowledge of it then sued for a declaration that, inasmuch as the award had been fully satisfied by payment of the money realised by the sale of the incorrect item it will not be open to the Society to execute the decree and contended that the order setting aside

*S.A. No. 625 of 1941. 19th August, 1942.

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that sale was without jurisdiction and invalid and asked for an injunction restraining execution against his properties. During the pendency of this suit the purchaser under the earlier sale filed a suit against the Society and obtained a decree for the return of the purchase-money. In the circumstances,

Held: (*i*) The proviso to clause (*iii*), sub-rule (10) of rule 22 framed under the Co-operative Societies Act enabled the Deputy Registrar to set aside a sale only before its confirmation and therefore the order of the Deputy Registrar setting aside the sale was invalid and without jurisdiction.

(*ii*) The remedy of *X* was not to proceed under section 57 of the Co-operative Societies Act as he was not a party to the execution proceedings and he was not a person who derived an interest subsequent to those proceedings from any of the parties to the proceeding. As a person having reasonable apprehension of an injury being caused to him, if property of his not liable to execution is proceeded against, *X* was entitled to move the Civil Court to prevent the injury being so caused.

(*iii*) As the purchaser under the earlier sale had obtained a decree for the return of the purchase money subsequent to the suit, the Society will be entitled to execute the award.

(*iv*) As the Society had acquired a right to execute the award pending the suit the discretionary relief by way of injunction cannot be granted.

Appeal against the decree of the District Court of Kistna at Chilakalapudi in A.S. No. 216 of 1940 preferred against the decree of the Court of the District Munsiff of Masulipatam in O.S. No. 462 of 1937.

P. Somasundaram and *P. Suryanarayana* for Appellant.

A. Lakshmayya for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant and the appeal arises out of a suit for a declaration that it is not open to defendants 1 and 3 to take out execution proceedings against the property described in the plaint and claimed by the plaintiff as his own. The properties in question and another item of property were originally mortgaged to the 1st defendant Co-operative Society by the 2nd defendant. Subsequently there was a sale in respect of the properties comprised in the suit to the plaintiff-appellant without disclosing the prior mortgage and as if there were no incumbrances in the property. The Deputy Registrar of Co-operative Societies, Bezwada acting as a Sale Officer, in execution of the award passed in respect of the mortgage ordered the sale of a property which was not mortgaged and which did not belong to the 2nd defendant. Money was realised by the sale and out of the sale proceeds the Co-operative Society was paid the amount due to it under the award. The balance of the amount was paid over to the 2nd defendant as if he were the owner of it. The purchaser subsequently found that the property did not belong to the 2nd defendant and was not mortgaged to the Society and that there was a mistake in the sale and moved the Deputy Registrar to set aside the sale. He set aside the sale accordingly. The 1st defendant Society thereupon moved the 3rd defendant to execute the award by proceeding against the properties which were the subject-matter of the same. The plaintiff-appellant who is entitled to two of the properties by right of purchase subsequent to the mortgage wants a declaration

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that, inasmuch as the award had been fully satisfied by payment of the money realised by the sale of the incorrect item, it will not be open to the 1st defendant to execute the decree, his further contention being that the order setting aside the sale was without jurisdiction and invalid and consequently, the decree must be considered to have been fully satisfied and that no execution could be taken out as against his properties.

The first Court found that the Deputy Registrar had no jurisdiction to set aside the sale, that the award must be considered to have been fully satisfied and that consequently the decree could not be executed as against the appellant and decreed the suit. But the lower appellate Court, though it came to the conclusion that the Deputy Registrar had no jurisdiction to set aside the sale, was of opinion that the plaintiff's remedy was not by means of a separate suit and that the proper course was to take proceedings under section 57 of the Co-operative Societies Act and that the suit was hence not maintainable. He allowed the appeal and dismissed the suit. Hence this appeal.

The points for consideration are:

(1) Whether the order of the Deputy Registrar setting aside the sale is invalid?

(2) If so, was the plaintiff entitled to file the suit for a declaration that the decree cannot be executed?

(3) Whether the plaintiff is entitled to the discretionary relief sought for, in view of the fact that the 1st defendant had, subsequent to the suit, to pay the money which he realised in satisfaction of the decree back to the purchaser?

Point No. 1.—The respondents' contention is that the proviso to clause (*iii*), sub-rule (10) of rule 22 framed under the Co-operative Societies Act enabled the Deputy Registrar to set aside the sale at any time. I do not think so. The proviso is only a proviso to clause (3) and comes before clause (4). The Deputy Registrar has powers under that proviso to set aside a sale only before confirmation and not subsequent to confirmation. And that is exactly what the first appellate Court has also found. I therefore find that the order passed by the Deputy Registrar was invalid and was passed without jurisdiction.

Point No. 2.—I do not think the lower appellate Court was justified in finding that the remedy of the plaintiff was to proceed under section 57 of the Co-operative Societies Act. The appellant was not a party to the execution proceedings and he is not a person who derives an interest subsequent to these proceedings from any of the parties to the proceeding. He could not therefore move the Registrar of the Co-operative Societies under section 57. An injury will be caused to him if the property, which was not liable to be proceeded in execution for realisation of the money due under an award, is proceeded against and he is deprived of the property. He has therefore reasonable apprehensions of an injury being caused to him and is entitled therefore to move Civil Court to prevent the injury being so caused. The suit hence was maintainable.

Whatever may be the effect of the order of the Deputy Registrar setting aside the sale, there is this fact, namely, that a

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suit was filed by the purchaser against the 1st defendant and a decree was obtained for return of the purchase money. The appellant no doubt was not a party to the suit. But he could not in the nature of things be made a party to the suit. It is not disputed that the property sold was a property which could not be sold in execution of the decree and it was not the property of the 2nd defendant. Consequently, the sale was improper. If the sale was improper and there was absolutely no vestige of any shadow of a title to the properties in the judgment-debtor, the purchaser was entitled to recover the money from the decree-holder and that was exactly what he had been able to succeed in recovering. *Macha Koundan* v. *Kottora Koundan*[1] was the case of a purchaser at a sale, in execution of a decree of a Civil Court getting a similar decree. So far as this point is concerned there is no difference between the purchaser in a sale held by a Sale Officer under the Co-operative Societies Act and the sale held by a Civil Court. It is true there is no provision similar to Order 21, rules 91 to 93 in the rules framed under the Co-operative Societies Act, but then the decision in *Macha Koundan* v. *Kottora Koundan*[1] was not based on any right claimable under Order 21, rules 91 to 93. The purchaser could get a decree because the interest of the judgment-debtor was absolutely nil and there was not even a shadow of a claim that could be set up in his favour. This is a similar case. When the money realised by the execution of a decree had to be paid to the purchaser by the decree-holder, then he will be entitled to execute the decree. This is pointed out in *Hafez Uzir Ali* v. *Nasimannessa Bibi*,[2] and I entirely agree with the observations of the learned Judge in that case. Consequently it cannot be said that to-day it will not be open to the 1st defendant to execute the decree. It is true on the date of the suit, the plaintiff was entitled to a decree; but it is a discretionary relief that he is asking for and I do not think I will be justified in giving him the relief now. It will be improper to issue the injunction as the 1st defendant had acquired a right to execute the decree subsequent to the filing of the suit by paying the amount to the purchaser in execution of the decree obtained against him for refund of the purchase money.

It is true that the appellant complains that he is a *bona fide* purchaser for value without notice of the mortgage and that the 2nd defendant may be asked to proceed against the other property of the judgment-debtor. But that is a matter for the executing Court to consider and if the appellant is able to satisfy the Court that he was a *bona fide* purchaser and that no injury would be caused to the judgment-debtor, or any other person by execution being directed against the other property, it would be open to the Sale Officer to proceed against it before proceedings against the properties of the appellant. It is a matter to be decided by him after hearing both sides and considering all the facts which may be presented to him.

In the result, the second appeal is dismissed. Each party will bear his own costs in all the three Courts inasmuch as it is

1. (1935) 69 M.L.J. 750: I.L.R. 59 Mad. 202 (F.B.).
2. A.I.R. 1928 Cal. 865 at 868.

the events which have transpired subsequent to the filing of the suit that have resulted in the plaintiff being refused the relief which he asked for and which he was entitled to on the date of the plaint. Rattayya v. Modumudi Co-operative Credit Society.

Leave refused.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Vishnubhotla Ramayya .. *Appellant** (*1st Deft.*)

v.

Sajja Namayya and others .. *Respondents* (*Plff. and Defts.*).

Ramayya v. Namayya.

Civil Procedure Code (V of 1908), sections 64 and 73—Rateable distribution—Creditor ceasing to have right to apply—Avoidance of alienation by judgment-debtor—Right of claimant.

When one decree-holder has attached property belonging to his judgment-debtor in execution of his decree another person holding a decree against the same judgment-debtor can apply to the Court under section 73, Civil Procedure Code, for rateable distribution of the assets realised in the execution proceedings instituted by the first decree-holder and when he applies before the assets are realised, that is brought into Court, he is entitled to rateable distribution. Sections 64 and 73, Civil Procedure Code, allow the second decree-holder to come in on the same terms as the first decree-holder provided he moves the Court in time. He cannot apply for rateable distribution after the assets have been realised. This means that any allenation made by the judgment-debtor after the attachment is void as against a creditor who has applied for rateable distribution in time. Where however the creditor has ceased to have a claim enforceable under the attachment he cannot challenge an alienaion under section 64.

Khushalchand v. *Nandram Sahebram*, (1911) I.L.R. 35 Bom. 516, followed.

Nana Rao v. *Arunachalam Chettiar*, (1940) 1 M.L.J. 482: I.L.R. (1940) Mad. 526 (F.B.), referred to.

Appeals under clause 15 of the Letters Patent against the judgments and decrees of Happell, J., dated 7th January, 1941, in S.A. Nos. 148 and 149 of 1939 preferred to the High Court against the decrees of the District Court of Kistna in A.S. Nos. 208 and 213 of 1937 respectively preferred against the decrees of the Court of the District Munsiff of Gudivada in O.S. Nos. 128 and 129 of 1935 respectively.

P. Satyanarayana Rao for Appellant.

Ch. Raghava Rao and *V. V. Sastri* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—These appeals have been heard together. The facts are the same in each case and they both raise the same question of law, namely, whether section 64 of the Code of Civil Procedure applies in the circumstances. Happell, J., who heard the second appeals out of which these appeals arise was of the opinion that it did not. Being appeals filed under clause 15 of the Letters Patent we are only concerned with the legal question.

In 1927 one Chalasani Anjaneyalu filed a suit in the Court of the Subordinate Judge of Masulipatam against two defendants,

*L.P.A. Nos. 15 and 16 of 1941. 27th July, 1942.

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named Lakshminarayana and Chalasani Ramayya respectively. The plaintiff failed to establish his case and consequently his suit was dismissed with costs, each defendant being given one set. On the 16th April, 1930, Lakshminarayana transferred his decree for costs to the appellant. Chalasani Ramayya filed E.P. No. 42 of 1932 to enforce payment of the costs decreed to him and in these proceedings attached on the 22nd July, 1932, immovable properties belonging to the judgment-debtor. On the 20th March, 1933, the Court sold by public auction the properties attached, but before the sale was confirmed the judgment-debtor deposited the amount of the decree plus the solatium of five per cent. required by Order 21, rule 89, and on the 29th July, 1933, the sale was set aside under Order 21, rule 92.

On the 1st March, 1933, the appellant filed E.P. No. 32 of 1933 to enforce payment of the amount due from the judgment-debtor to him as the assignee of Lakshminarayana's decree. He asked for the attachment of the properties which Chalasani Ramayya had attached and for rateable distribution. On the 1st April, 1933, the Subordinate Judge passed an order recognising the appellant as the assignee of Lakshminarayana's decree and his right to rateable distribution, but made no order of attachment on this petition. The judgment-debtor had objected to the appellant being permitted to proceed in execution because he challenged the validity of the assignment of the decree. As the result of the order passed by the Subordinate Judge on the 1st April, 1933, the judgment-debtor appealed to this Court. His appeal was allowed and the case remanded to the Subordinate Judge with instructions to hear the judgment-debtor's case on its merits. This the Subordinate Judge did and came to the conclusion that the judgment-debtor's opposition was groundless. The result was that on the 7th December, 1936, he passed a similar order to the one which he had passed on the 1st April, 1933.

On the 23rd June, 1933, the appellant filed another application asking for the attachment of the properties belonging to the judgment-debtor. An order of attachment was passed on the 30th June, 1933, but was discharged on the 31st October, 1935.

On the 12th May, 1933, that is during the attachment effected by Chalasani Ramayya of the judgment-debtor's properties, the judgment-debtor sold a portion of them to one Namayya. This sale provided him with the money to pay into Court the amount due to Chalasani Ramayya under his decree, plus the solatium payable to the auction-purchaser. The judgment-debtor had previously sold another portion of the attached properties to a person named Sundaramma. That sale took place on the 30th July, 1932, eight days after Chalasani Ramayya had obtained the order of attachment. Sundaramma bequeathed the property bought by her to one Sowbhagyamma under a will dated 1st April, 1934. On the 10th March, 1934, Namayya filed a petition under Order 21, rule 58, objecting to the attachment which had been effected by the appellant on the properties of the judgment-debtor on the 30th June, 1933. Namayya's petition was dismissed and accordingly he brought O.S. No. 128 of 1935 in the District

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Munsiff's Court of Gudivada under Order 21, rule 61, to establish the right which he claimed. It is out of this suit that L.P.A. No. 15 of 1941 arises. The attachment effected by the appellant on the 30th June, 1933, caused Sowbhagyamma also to file a petition of objection. This was likewise dismissed and consequently she filed O.S. No. 129 of 1935, which has given rise to L.P.A. No. 16 of 1941.

The two suits were tried together. The question at issue was whether the alienations were void under section 64 of the Civil Procedure Code. The appellant, who was the 1st defendant, claimed that section 64 applied and as the alienations in favour of the plaintiffs had been made after the attachment effected by Chalasani Ramayya on the 22nd July, 1932, they were void as against him, he being entitled to rateable distribution as the result of his application of the 1st March, 1933. He could not rely on the order of attachment made on his application of the 23rd June, 1933, as that had been passed after the alienations, and moreover the attachment had been discharged. The District Munsiff held that as the result of Chalasani Ramayya's attachment the alienations were void under section 64 and consequently dismissed the two suits. Appeals followed to the District Judge of Kistna. The District Judge agreed with the District Munsiff and this led to the plaintiffs appealing to this Court. They were heard by Happell, J., who allowed them, as he considered that the alienations were not void under section 64 of the Code of Civil Procedure. The basis of his decision was that as the sale had been set aside under Order 21, rules 89 and 92, the appellant could not claim rateable distribution because there was nothing to distribute.

It cannot be denied that as the result of the setting aside of the sale which took place on Chalasani Ramayya's petition the attachment came to an end. The decree-holder got the decretal amount which the judgment-debtor had paid into Court, the auction-purchaser received back the money which he had paid into the Court as the purchase consideration, plus the solatium of five per cent. and the judgment-debtor remained in possession of his property free from any liability to Chalasani Ramayya.

Section 64 of the Code of Civil Procedure states:

"Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation:—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets."

When one decree-holder has attached property belonging to his judgment-debtor in execution of his decree another person holding a decree against the same judgment-debtor can apply to the Court under section 73 for rateable distribution of the assets realised in the execution proceedings instituted by the first decree-holder and when he applies before the assets are realised, that is brought into Court, he is entitled to rateable distribution. Section 64 and section 73, allow the second decree-holder to come in on the same terms as the first decree-holder, provided he moves the Court

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in time. He cannot apply for rateable distribution after the assets have been realized, see *Nana Rao* v. *Arunachalam Chettiar*.[1] This means that any alienation made by the judgment-debtor after the attachment is void as against a creditor who has applied for rateable distribution in time.

The appellant says that as he applied in time for rateable distribution the alienations made by the judgment-debtor in favour of the plaintiffs must be deemed to be void under section 64. In our opinion section 64 does not help the appellant. Section 64 does not say that the alienations shall be void absolutely. What it says is that they shall be void as against all claims enforceable under the attachment. When the attachment is set aside by reason of the decree-holder having been paid in full, the attaching decree-holder has no claim against the judgment-debtor and therefore there is no claim enforceable under the attachment. The appellant was not paid and he had a claim against his judgment-debtor, but as the attachment had been set aside it was not a claim which could be enforced under the attachment and unless it was enforceable under the attachment section 64 could not apply. Happell, J., has based his decision on the fact that when the decree-holder was paid and the auction-purchaser withdrew his money from Court there was nothing to distribute. That is true, but we prefer to put it on the ground that the Court was no longer concerned with the alienations in favour of the plaintiffs because these alienations were only void against the appellant under section 64, so long as he had a claim which was enforceable under the attachment. He had no such claim when these suits were brought and the alienations could not be challenged under that section. It follows that we agree with the opinion expressed by the Bombay High Court in *Khushalchand* v. *Nandram Sahebram*[2] that the moment the attachment ends all claims which were enforceable under it cease to be enforceable. Whether the alienations can be challenged here on another ground is a different matter. Other issues were raised in the suits and the learned Judge has remanded them for trial on the merits.

As we consider that the learned Judge was right in holding that section 64 did not apply we dismiss the appeals with costs.

B. V. V. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kalavagunta Narasinga Rao Garu .. *Petitioner** *(Plaintiff)*

v.

Vuppulapati Rangayya and another .. *Respondents* *(Defendants).*

Narasinga Rao Garu v. Rangayya.

Limitation Act (IX of 1908), section 19—Open payment endorsed on promissory note—Endorsement not stating that payment was made towards the debt—If can serve as acknowledgment under section 19.

Bare statements of payments endorsed on a promissory note cannot serve as acknowledgments of the debt. If limitation is to be saved under

1. (1940) 1 M.L.J. 482: I.L.R. (1940) Mad. 526 (F.B.).
2. (1911) I.L.R. 35 Bom. 516.

*C.R.P. No. 701 of 1941. 27th August, 1942.

Narasinga Rao Garu v. Rangayya.

section 19, one must be able to read into an indorsement not merely that a payment has been made but that a further sum is admitted to be due.

Tayerali v. *Garabad Sadu*, A.I.R. 1939 Bom. 252, distinguished.

A decree cannot be said to be a consent decree merely because the defendants remained *ex parte*; it can only be a consent decree if the defendants appear and admit the claim.

Raja of Kallikota v. *Chaitana Sahu*, (1920) L.R. 47 I.A. 200, distinguished.

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Narasaraopet, dated 4th November, 1940, and passed in S.C.S. No. 203 of 1940.

B. V. Ramanarasu for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The petitioner brought this suit on a promissory note and relied on two indorsements to save limitation. The first was:

"On the 3rd of Chitra Suddha of the year Bhava the amount paid in cash is Rs. 10 (Rupees Ten only)."

With regard to a payment made a little less than three years later, the indorsement was:

"The amount paid on the first day of Phalguna Suddha of the year Dhatu is Rs. 2 (Two rupees)."

The defendants remained *ex parte* but the District Munsiff dismissed the suit on the ground that the indorsements did not save limitation under section 20 of the Limitation Act.

It is not denied by the petitioner that the learned District Munsiff was right in saying that section 20 of the Limitation Act did not save the suit from the bar of limitation; but he contends that the learned District Munsiff did not consider, as he should have done, whether these endorsements saved limitation under section 19 of the Limitation Act as acknowledgments. There can be no doubt that if the petitioner had added to his statement of payments that they were made towards the suit debt, these endorsements would have served as written acknowledgments which would save limitation; but I do not see how bare statements of payments can serve as acknowledgments of a debt. If limitation is to be saved under section 19, one must be able to read into an endorsement not merely that a payment has been made but that a further sum is admitted to be due. In no case cited before me has such a bare statement of payment been interpreted as an acknowledgment. The nearest approach to it is the judgment of Sir John Beaumont, C.J., in *Tayerali* v. *Garabad Sadu*.[1] There were two indorsements in that case. One was that the debtor had given certain bajri of the value of Rs. 54 towards vasul and then again at the bottom of the document it was written "Rs. 54 paid as vasul". These indorsements were construed by Sir John Beaumont, C.J., in these words:

"There is a payment of Rs. 54 on account of the debt, which must mean the debt secured by the document on which this indorsement was made."

I am unable to read in the present indorsements any suggestion

1. A.I.R. 1939 Bom. 252.

Narasinga Rao Garu v. Rangayya.

that a further sum is admitted to be due by the defendants to the plaintiff.

Another contention raised by the petitioner is that in view of the fact that the defendants were *ex parte*, the lower Court should not have dismissed the suit. The learned advocate for the petitioner has referred me to *Raja of Kallikota* v. *Chaitana Sahu*,[1] which related to a suit on an account in which it became clear upon perusing the account that all the items relied on by the plaintiffs were barred by time. The defendant however was unwilling to rely on the bar of limitation and wanted the suit disposed of on the merits. Their Lordships were of opinion that under the circumstances the decree was a consent decree. The fact that the defendants remained *ex parte* does not mean that the decree was a consent decree; it can only be a consent decree if the defendants appear and admit the claim.

The petition therefore fails and is dismissed.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Puthen Purayil Krishnan .. *Petitioner* (Petitioner—Attaching Decree-holder).*

v.

U. M. Krishnan .. *Respondent (2nd Respondent—2nd Defendant).*

Krishnan v. Krishnan.

Madras Debt Conciliation Act (XI of 1936), *section* 14 (2)—*Agreement between decree-holder and judgment-debtor—Effect on decree—Attaching decree-holder of the decree—Right to execute decree despite the agreement.*

X applied on 6th November, 1939, to attach a decree obtained by a person *A* against *B*. Five days later *B* filed an application under the Debt Conciliation Act and notice was ordered to the decree-holder *A*. On 20th December, 1939, the attachment was ordered. On 22nd January, 1941, an agreement was entered into between *A* and *B* under section 14 (1) of the Debt Conciliation Act and duly registered whereby the debt of *A* was considerably reduced. When *X* put in an application to execute the attached decree,

Held: Though the agreement under section 14 (1) when registered takes effect as if it were a decree of a Civil Court and is executable as such, it does not supersede the decree obtained by the creditor in the Civil Court. The decree-holder *A* cannot execute because he would be met by the plea that he had entered into an agreement with the judgment-debtor *B* that he would receive a lesser amount. But such an agreement only binds the parties to it, and as such cannot be pleaded in bar of execution by the attaching decree-holder.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Tellicherry, dated the 9th August, 1941 and made in S.E.P. No. 100 of 1941 in S.C.S. No. 495 of 1938.

K. N. Kumaran for Petitioner.

A. Atchuthan Nambiar for Respondent.

The Court delivered the following

JUDGMENT.—On 6th November, 1939, the petitioner applied to attach a decree obtained against the 2nd respondent. Five

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1. (1920) L.R. 47 I.A. 200.

*C.R.P. No. 2768 of 1941. 12th August, 1942.

Krishnan v. Krishnan.

days later, on 11th November, 1939, the 2nd respondent filed an application under the Debt Conciliation Act and notice was ordered to the decree-holder. On 20th December, 1939, the attachment of the decree was ordered. More than a year later, on 22nd January, 1941, an agreement was entered into under section 14 (1) whereby the debt of the creditor was considerably reduced. When the petitioner put in an application to execute the attached decree, it was dismissed by the District Munsiff on the ground that the petitioner was not entitled to execute the decree; because such rights as the original decree-holder had against the 2nd respondent had been superseded by the agreement.

Under section 14 (2) of the Debt Conciliation Act, an agreement entered into between a creditor and debtor has to be registered. It then takes effect as if it were a decree of a Civil Court and is executable as such. It does not supersede the decree of the creditor obtained by him in the Civil Court; but it presumably makes it impossible for the decree-holder to execute it; because the decree-holder would be met by the plea that he had entered into an agreement with the judgment-debtor that he would receive a lesser amount. No provision of the Debt Conciliation Act suggests that an order passed under section 14 nullifies a decree passed by the Court. The decree therefore continues in existence. The agreement under section 14 (1) is only an agreement and therefore binds only the parties to the agreement. The attaching decree-holder has the same right to execute that the original decree-holder had at the time of attachment.

I therefore hold that the decree can still be executed by the attaching decree-holder. I do not agree that that would be inequitable to the judgment-debtor. On the contrary, it would indeed be inequitable if an agreement entered into between the debtor and a person no longer interested in the decree were to bind a person who was not a party to the agreement. In the present case, for example, it is pretty clear that the application under the Debt Conciliation Act was filed and the agreement entered into in order to defeat the rights of the petitioner.

The petition is therefore allowed and the execution petition remanded to the lower Court for disposal according to law. The costs of this petition will be costs in the execution proceedings.

K.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Arumuga Thevar .. *Petitioner* (2nd Accused).*

Arumuga Thevar *In re*

Criminal Procedure Code (V of 1898), *section* 106—*Order for executing bond for keeping peace—Tacking on to conviction for petty offences—Propriety.*

It is generally undesirable where a person is charged with some petty offence, to tack on to some small sentence of fine an order under section 106 of the Criminal Procedure Code, which in most cases, in view of the poverty of the accused persons, would necessitate their remaining in jail for a long

*Crl.R.C. No. 417 of 1942 (Crl.R.P. No. 404 of 1942). 31st August, 1942.

Arumuga Thevar, *In re.*

period which very much exceeded the punishment legally permissible for the offence of which the accused were charged. An order under section 106 is of course legally permissible but should be used very sparingly in such cases. Before passing an order under that section the Magistrate should be satisfied on legal evidence that it is necessary to require the accused person to execute a bond for keeping the peace. The period for which the bond is to be executed must be in proportion to the gravity of the offence committed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Special First Class Magistrate, Ambasamudram, dated the 12th June, 1942, and passed in Calendar Case No. 10 of 1942.

V. T. Rangaswami Aiyangar for Petitioner.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been fined Rs. 20 under section 3, clause (12) of the Town Nuisance Act. He has also been bound over under section 106, Criminal Procedure Code, to execute a bond for keeping the peace for a period of two years.

In revision I do not find any reason for not accepting the finding of fact that the petitioner was drunk and disorderly on the day in question. It is pointed out that such an offence is not a cognizable one and that P.W. 1 should himself have filed the complaint and not the police. However that may be, that cannot be a sufficient reason for interfering in revision with a just order.

This case was admitted with regard to the order passed under section 106, Criminal Procedure Code. It is generally undesirable where a person is charged with some petty offence, to tack on to some small sentence of fine an order under section 106, which in most cases, in view of the poverty of the accused persons would necessitate their remaining in jail for a long period which very much exceeded the punishment legally permissible for the offence of which the accused were charged. An order under section 106 is of course legally permissible, but should be used very sparingly in such cases.

Needless to say, before passing an order under section 106, the Magistrate should be satisfied that it is necessary to require the accused person to execute a bond for keeping the peace, *i.e.*, the Magistrate should be satisfied that if he does not call upon the accused to furnish such a bond there is a likelihood that there will be breaches of the peace in future. It is difficult for the Magistrate to come to such a conclusion on a solitary instance of disorderliness where the evidence is of a very simple nature. The evidence in this case does not at all disclose that the accused is likely to do something similar in the future.

In deciding whether an order under section 106, Criminal Procedure Code, should be passed or not, the Magistrate must moreover consider only legal evidence. He should not act on statements made by the prosecution from the Bar. Finally, even if all the evidence justifying an order under section 106 Criminal Procedure Code were available, the order requiring the accused

to furnish a bond for keeping the peace for a period of two years is out of all proportion to the gravity of the offence committed.

Arumuga Thevar, *In re.*

The petition is allowed with regard to the order under section 106, Criminal Procedure Code, which is set aside. The order as to fine and in default as to imprisonment will stand.

K. S. — *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kondepu China Rangiah .. *Petitioner** (*Accused*).

China Rangiah *In re.*

Penal Code (XLV of 1860), sections 183 and 186—Charge of carrying away property attached by amin in execution of a Munsiff Court decree—Amin and Nazarat under supervision of Subordinate Judge in the place—Person duly authorised to file complaint.

Where the charge was that the accused carried away the property which the amin had attached and in other ways obstructed him in executing a decree of the District Munsiff's Court and the amin was under the charge and direction of the Nazir subject to the supervision and control of the Subordinate Judge in that place, the amin is not subordinate to the District Munsiff. The complaint could be filed by the amin himself or by the Nazir or the Subordinate Judge or any of the superiors of the Subordinate Judge, but not by the District Munsiff.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the District Magistrate, Kistna, dated 26th February, 1942, and made in Criminal Revision Petition No. 20 of 1941 preferred against the order of the Court of the Stationary Sub-Magistrate, Gannavaram, dated 26th November, 1941, and made in C.C. No. 805 of 1941.

B. Lakshminarayana for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—An amin of Bezwada, where a Subordinate Judge's Court and a District Munsiff's Court are situated, was executing a decree of the District Munsiff's Court, when the petitioner is said to have carried away the property which the amin had attached and in other ways obstructed him. The amin reported the matter when he returned; and the District Munsiff whose decree he was executing thereupon filed a complaint in the local First Class Magistrate's Court; and he transferred it to the Stationary Sub-Magistrate who is now trying the petitioner on charges under sections 183 and 186 Indian Penal Code.

The point taken in this revision application is that the complaint was not filed by a duly authorised person. When a public servant is obstructed in the exercise of his duties he himself can complain or any person to whom he is subordinate. In a general way amins are of course subordinate to District Munsiffs; but in this particular case the Nazarat at Bezwada was under the charge and direction of the Nazir, subject to the supervision and control of the Subordinate Judge. When the District Munsiff

*Crl.R.C. No. 365 of 1942 (Crl.R.P. No. 355 of 1942). 19th August, 1942.

China Rangiah, *In re.*

wishes a process to be executed he sends it to the Nazarat for necessary action; but neither the Nazir nor the process staff are under the supervision and control of the District Munsiff. The amin was not therefore the subordinate of the District Munsiff. The complaint could have been filed by the amin himself, or by the Nazir (who is the person who generally files a complaint in such cases), or by the Subordinate Judge, or, of course, by any of the superiors of the Subordinate Judge; but not by the District Munsiff.

This petition is allowed and the Sub-Magistrate ordered to return the complaint to the District Munsiff. The amin himself or the Nazir or the Subordinate Judge or any officer superior to the Subordinate Judge may of course file a complaint.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Siddappa Chettiar .. *Petitioner** (*Plff.—Petr.*).

Siddappa Chettiar, *In re.*

Madras Debt Conciliation Act (XI of 1936), section 10 (2)—If applies only to debts shown by the debtor in his application under section 4 of the Act.

When notice of a petition by a debtor for conciliation of his debts is issued to the creditors under section 10 (1) of the Madras Debt Conciliation Act, the duty then devolves upon each of such creditors of submitting a statement of all debts owing to him by the debtor. Such statement is not to be limited to the debts given by the debtor himself in his application under section 4. The effect of section 10 (2) is that any debt not included in the creditor's statement is for all purposes deemed to have been discharged.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Dharmapuri, dated 14th February, 1942, and passed in S.C.S. No. 299 of 1941, etc.

D. Ramaswami Aiyangar for Petitioner.

The Court delivered the following

JUDGMENT.—The facts leading to these revision petitions are that the defendant in Small Cause Suit No. 299 of 1941 on the file of the District Munsiff of Dharmapuri filed an application under section 4 of the Madras Debt Conciliation Act in respect of a mortgage debt due to the plaintiff. In due course the plaintiff was called upon to file a statement of his claims under section 10 (1) of the Act. This he failed to do in spite of notices served upon him and finally the debt was deemed to be discharged under section 10 (2) of the Act. Subsequently, the plaintiff filed the present suit on a promissory note and the defendant's answer was that all debts due to the creditor had been wiped out under section 10 (2) of the Act. The learned District Munsiff accepted this plea and dismissed the suit.

The point which has been raised in revision is that section 10 (2) of the Act applies only to debts which have been shown by the debtor in his application under section 4. This is not what the sub-section says. It is in the following words:

*C.R.P. Nos. 840, 841 and 842 of 1942. 27th July, 1942.

"Subject to the provisions of sub-section (3) every debt of which a statement is not submitted to the Board in compliance with the provisions of sub-section (1) shall be deemed for all purposes and all occasions to have been duly discharged."

The meaning of these words is not open to any possible doubt. Under section 10 (1), if the Board, after examining the debtor, is of the opinion that it is desirable to effect a settlement between the debtor and his creditors, a notice is then issued to each of the creditors and upon each creditor served with the notice the duty then devolves of submitting a statement of all debts owing to him by the debtor. Clearly this statement is not to be limited to the debts given by the debtor himself in his application under section 4 although there is a burden on him to include in his application particulars of all his debts. When creditors have filed their statements, the conciliation proceeds on the basis of their statements and it is clear from section 10 (2), that debts which are not included in those statements are outside the scope of the settlement and cannot be sued upon in future. If section 10 (2) is to be limited to debts mentioned only by the debtor in his application, then there can be no purpose in calling on creditors to file statements of all their claims and it would be open to a debtor to file successive applications for each one of his debts as each of his creditors proceeds against him in execution. I do not think there can be any doubt about the meaning of the plain words in section 10 (2) of the Act, the effect of which is that any debt not included in the creditor's statement is for all purposes deemed to have been discharged. The order of the Munsiff dismissing the suit was therefore correct and Civil Revision Petition No. 840 is dismissed.

Civil Revision Petitions Nos. 841 and 842 relate to the learned Munsiff's order under section 10 (3) of the Act. The plaintiff applied subsequently for the revival of his other debts on the ground that there was sufficient cause for his failure to furnish the statement of his claims under section 10 (1). The learned Munsiff found as a fact that he had been served with notice and that there was no sufficient cause for his failure. There is no error of jurisdiction in these proceedings and both the petitions are also dismissed.

K.S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Muthu Goundan and others .. *Appellants** (*Defendants*)

v.

Mottayan *alias* Kolanda Goundan .. *Respondent* (*Plaintiff*).

Muthu Goundan *v.* Mottayan.

Limitation Act (IX of 1908), Article 116—Vendor and Vendee—Money left with vendor to pay mortgage—Default in payment—Mortgagee filing suit and vendee evicted in execution—Suit for damages—Starting point of limitation—Measure of damages.

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*S.A. Nos. 780 and 1116 of 1940. 21st July, 1942.

Muthu Goundan v. Mottayan.

Where the vendee of certain land left the consideration money with the vendor for the purpose of discharging a subsisting mortgage on the property sold, and the vendor having defaulted to pay the amount the mortgagee instituted a suit on his mortgage and the vendee was eventually dispossessed by the purchaser in execution of the mortgage decree and thereupon he filed a suit for damages against the vendor,

Held that the suit should be conceived as one for damages for breach of the covenant for quiet enjoyment and the starting point of limitation was the date of the dispossession.

Held further, that the measure of damages to which the plaintiff would be entitled was the market value of the property on the date of the eviction.

Alagarappa Reddiar v. *Alagirisami Naick*, (1935) 68 M.L.J. 588, referred to.

Appeals against the decree of the District Court of Salem in A.S. No. 207 of 1939 preferred against the decree of the Court of the District Munsiff of Sankaridrug at Salem in O.S. No. 98 of 1939.

B. V. Viswanatha Aiyar for Appellants.

V. V. Ramadurai for Respondent.

The Court delivered the following

JUDGMENT.—The 1st defendant is the appellant in S.A. No. 780 and his sons, defendants 2 and 3 are the appellants in the other appeal. These two appeals arise out of a suit filed by the respondent for damages for breach of covenant for quiet enjoyment. Under a sale deed executed on the 19th April, 1928, the 1st defendant conveyed the plaint mentioned properties to the plaintiff for a consideration of Rs. 1,000. It was recited in the document that the sale was for discharging a debt due to one Poongavanam Ammal. It was a mortgage debt. The plaintiff's case was that the understanding between the parties was that the 1st defendant should discharge the mortgage. The recital in the document that Rs. 1,000 was received for discharging his debt was relied on in support of his case. The 1st defendant pleaded that the money due to Poongavanam Ammal was left with the vendee for payment and therefore he was not bound to pay it. A suit was filed for recovery of the money due under the mortgage executed to Poongavanam Ammal, the hypotheca was brought for sale and the plaintiff was dispossessed of the property he purchased. He therefore filed this suit. He claimed Rs. 1,000, the consideration paid by him, as damages due to him. Defendants 2 and 3 were impleaded as the undivided sons of the 1st defendant. The first Court found that the money payable to Poongavanam Ammal was retained by the vendee and that it was his default that resulted in the suit and the execution proceedings and that therefore he will not be entitled to any damages. The lower appellate Court found that the money was not retained by the vendee but was paid to the vendor and that consequently he was bound to discharge the debt and his failure to discharge the debt resulted in the vendee losing his properties. It therefore gave a decree for Rs. 1,000, the consideration amount, as against the 1st defendant and dismissed the suit, as against the defendants 2 and 3, but without costs. The 1st defendant has filed the appeal against the decree for Rs. 1,000 and defendants 2 and 3 have appealed against the decree of the lower appellate Court not providing for their costs.

Muthu Goundan v. Mottayan.

The only three points urged in these two appeals in this Court are:—

(1) Whether the plaintiff's suit was barred by limitation;

(2) Whether the measure of damages was the consideration paid or the value of the property at the time of the dispossession; and

(3) Whether the lower appellate Court was wrong in not awarding the costs of defendants 2 and 3.

Point No. 1.—The suit has to be conceived as one for breach of the covenant for quiet enjoyment and consequently the starting point of limitation is the date of the dispossession and it is not disputed, if that be so, the suit is in time. The first Court has dealt with the point of limitation and has found that the starting point of limitation was the date of dispossession and that therefore the suit was in time. This case was on all fours with the case reported in *Alagarappa Reddiar* v. *Alagirisami Naick.*[1] That was also a case in which in execution of a decree obtained on a prior mortgage the property was brought for sale and the vendee was evicted and he sued for recovery of damages. It was held that the starting point of limitation was the date of dispossession. It is true in that case the mortgage on which the suit was filed was not known to the parties, but that makes no difference.

The learned counsel for the appellant cited a number of cases which dealt with claims resulting from default on the part of the purchaser in paying mortgage debts undertaken to be paid by him and which resulted in the vendor being evicted from other properties of his not covered by the sale but covered by the mortgage. There could be no covenant for quiet enjoyment in such cases and therefore those cases have no application to the facts of this case. I therefore find the suit was in time.

Point No. 2.—With regard to the measure of damages, it was for breach of the covenant for quiet enjoyment and consequently the measure of damages would be the market value of the property on the date of the dispossession. That was what was found by this Court in *Algarappa Reddiar* v. *Alagirisami Naick.*[1] The learned District Judge has not adverted to this aspect of the case but took the consideration paid by him as the measure of damages. He was wrong. I therefore find the damages which the plaintiff will be entitled to is the market value of the property on the date of eviction.

As no evidence was let in about the market value of the property on the date of eviction, the suit will have to be remanded to the first Court.

Point No. 3.—The lower appellate Court has not given any reason why costs were not awarded to defendants 2 and 3, nor has it given any reasons as to why it found defendants 2 and 3 not liable. It was a case of contractual obligation and the plaintiff's case was that as undivided sons they were also liable. The first Court no doubt dismissed the suit against defendants 2 and 3; but that was because the case against defendant 1 had not been made

1. (1935) 68 M.L.J. 588.

Muthu Goundan v. Mottayan.

out. In the absence of any finding that defendants 2 and 3 had become divided from the 1st defendant, the suit ought to have been decreed against them also. The defendants 2 and 3 cannot in these circumstances be heard to complain against the disallowance of their costs.

In the result S.A. No. 1116 of 1940 is dismissed. I make no order as to costs as the respondent is unrepresented and is absent.

In the other appeal the decree of the lower appellate Court is set aside and the suit remanded to the first Court for taking the evidence as regards the market-value of the property on the date of eviction and to dispose of the suit in the light of the findings given above. The costs in all the three Courts will follow and abide the final result of the suit. The court-fee paid on the second appeal memorandum will be refunded.

B.V.V. — *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Messrs. S. V. M. Mahomed Jamaluddeen and Brothers, Pettah, Colombo .. *Applicant**

v

The Commissioner of Income-tax, Madras .. *Respondent.*

Mahomed Jamaluddeen and Bros., Colombo v. Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922), section 4-A (b)—*"Resident"—Firm having Head Office at Colombo—Branch in British India managed by resident partner—Liability to assessment.*

The assessee firm commenced carrying on business in Colombo in 1932. In 1937 it opened a branch at a place in British India and the business there was managed by a partner of the firm who resided at the place.

Held, that under the circumstances the firm was "resident" in British India under section 4-A (*b*) of the Indian Income-tax Act, and was liable to be assessed to income-tax.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Income-tax Act, XI of 1922, as amended by section 92 of the Income-tax (Amendment) Act VII of 1939 in Application No. 66, R.A. 2 Madras of 1941-1942 on its file for decision on the following question of law, *viz.*:

"Whether on the facts and in the circumstances of this case, the applicant firm was "resident" in British India under section 4-A (*b*) of the Income-tax Act."

M. Subbaraya Aiyar for Applicant.

K. V. Sesha Aiyangar for Respondent.

The Judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The Income-tax Appellate Tribunal has referred the following question to this Court:

"Whether on the facts and in the circumstances of this case, the applicant firm was "resident" in British India under section 4-A (*b*) of the Income-tax Act."

The Tribunal has expressed the opinion that the applicant firm was resident in British India and we have no hesitation in concurring in that opinion.

*Case Referred No. 16 of 1942. 28th September, 1942.

Mahomed Jamaluddeen and Bros., Colombo v. Commissioner of Income-tax Madras.

Leach, C.J.

The firm commenced carrying on business in Colombo in 1932. In the year 1937 it opened a branch at Kilakarai in British India. Business was carried on there and it was managed by a partner of the firm, who was resident at Kilakarai. There were four partners, all of whom belonged to Kilakarai.

Section 4-A (*b*) says that a firm is resident in British India unless the control and management of its affairs is situated wholly without British India. It has been found as a fact—and the finding is conclusive—that the business in Kilakarai was managed by a partner there. Therefore the control and management of the firm was not wholly without British India. That being the case the firm is liable to be taxed under the Indian Income-tax Act. Section 4-A is a new section and the question here is governed by its terms. Before the Tribunal there was apparently much discussion of clause (7) of the partnership deed which provides for the management of the firm in Colombo. We do not consider that this clause has any bearing on the question. What the Court has to consider is the question whether the firm was controlled and managed wholly outside British India, and it is obvious that it was not. The question referred will be answered in the affirmative and as the assessee has failed he must pay the costs, Rs. 250.

B. V. V. *Reference answered against assessee.*

[SPECIAL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

S.B.

A Pleader, *In the matter of.*

In the matter of A Pleader.*

Legal practitioner—Tutoring witness—Improper conduct.

It is very improper for a legal practitioner to tutor a witness inside or outside Court and when the tutoring takes place in Court and in spite of warnings the professional misconduct is all the greater.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) in support of the notice.

Respondent in person.

The Order of the Court was made by

Leach, C.J.

The Chief Justice.—The respondent is a pleader practising in the Bellary District. He was convicted by the Stationary Sub-Magistrate of Rayadrug of an offence under section 228 of the Indian Penal Code and sentenced to pay a fine of Rs. 15, or in default to undergo simple imprisonment for a week. The nature of his offence was this. His client was in the witness box under cross-examination and he was tutoring her with regard to the answers she should give. He was warned by the Magistrate, but he persisted in his improper conduct. The conviction and sentence were concurred in by the District Magistrate of Bellary on appeal and by this Court in revision. As the result of this conviction the respondent has been charged with professional misconduct.

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*Referred Case No. 18 of 1942. 5th October, 1942.

S.B.
A Pleader, *In the matter of.*
Leach, C.J.

That he was guilty of gross professional misconduct is not now open to question. It is very improper for a legal practitioner to tutor a witness inside or outside Court and when the tutoring takes place in Court and in spite of warnings the professional misconduct is all the greater. The respondent has tendered an apology to this Court and has undertaken not to repeat his offence. His offence is, however, so grave that we cannot allow the matter to end with a mere censure on him. We have taken into consideration his apology and his promise with regard to future behaviour, but his sanad will be suspended for one month from to-day.

K.S. *Sanad suspended for a month.*

[SPECIAL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

The Advocate-General, Madras .. *Petitioner**

v.

Sri Ramanatha Goenka, Editor, Printer and Publisher of the Indian Express, No. 100 Wallajah Road, Madras .. *Respondent.*

S.B.
Advocate-General, Madras *v.* Sri Ramanatha Goenka.

Contempt—Article in newspaper suggesting in respect of a case decided that there could not be any proper judicial trial—Contempt.

In the course of an article in a newspaper relating to a particular conviction, it was stated: "The prosecution clearly stated that the case was filed as the result of 'correspondence from Government' but with the blessings of the Magistrate refused to produce the correspondence and the statement had to go untested. Without meaning any disrespect, we doubt whether in any case where opinions count, any Subordinate Magistrate will give a judgment contrary to what he believes the Government of the day has decided. The fate of this case was sealed the minute, the police told the Magistrate that the Government was behind the prosecution".

Held, that the statement amounted to a gross contempt of Court.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to punish the respondent for contempt of the Court of the Third Presidency Magistrate of Madras for having published an article in the leading columns of the issue of the Indian Express bearing date the 16th August, 1942, under the caption "Dieu Et Mon Droit" filed therewith.

The Petitioner in person.

B. Sitarama Rao for *V. V. Srinivasa Aiyangar* and *V. C. Gopalaratnam* for Respondent.

The Order of the Court was made by

Leach, C.J.

The Chief Justice.—The respondent is the editor, printer and publisher of "The Indian Express". He has been called upon to show cause why he should not be punished for contempt of the Court of the Third Presidency Magistrate, Madras. On

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*Crl.M.P. No. 514 of 1942. 23rd September, 1942.

S.B.

Advocate-General, Madras v. Sri Ramanatha Goenka.

Leach, C.J.

the 14th August he was convicted by the Third Presidency Magistrate of having published in his newspaper an obscene advertisement and was sentenced to pay a fine of Rs. 100, or in default to undergo simple imprisonment for a week. The respondent had the right to challenge the correctness of the conviction and sentence in an application to this Court but he accepted the decision and consequently no application for revision was filed. On the 16th August, he published a leading article in his newspaper in the course of which he said:

"The prosecution clearly stated that the case was filed as the result of 'correspondence from Government' but with the blessings of the Magistrate refused to produce the correspondence and the statement had to go untested. Without meaning any disrespect, we doubt whether in any case where opinions count, any Subordinate Magistrate will give a judgment contrary to what he believes the Government of the day has decided. The fate of this case was sealed the minute the Police told the Magistrate that the Government was behind the prosecution."

We accept the statement in the affidavit filed in support of this application that this passage suggests that there was not and there could not be any proper judicial trial, that the proceedings before the Magistrate were an empty formality, that the Magistrate had made up his mind to convict the accused even before the trial was over with a view to conform to what he believed to be the wishes of the Government. In other words, once the Magistrate knew that the Government had instituted the prosecution there was bound to be a conviction. It is difficult to imagine a contempt more gross than this. In his affidavit in reply to the one filed in support of the petition the respondent states that he had no intention of committing contempt of Court. His affidavit is merely an attack on Government and the Special Press Adviser whom he suspected of having caused his prosecution to be launched. He expresses no apology for the gross contempt which he has committed. Mr. Sitarama Rao, in his address to the Court, has however supplemented the affidavit by stating that his client does tender an unconditional apology.

The matter cannot be allowed to end with the tender of this apology. The contempt is too grave and this Court has a duty to perform in the matter. This Court cannot allow attacks of this nature to be made against the Subordinate Courts of this Province without taking serious action. The respondent will have to be punished and the sole question is, what shall be the punishment. If the apology had not been tendered the only proper course would have been to commit the respondent to prison, but as he has tendered an unqualified apology we will not take this course. The respondent will be directed to pay a fine of Rs. 250 and in default of payment to undergo simple imprisonment for a period of two months. In addition he will pay the costs of these proceedings, which we fix at Rs. 150.

K. S. *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Chelliah *alias* Kariamanickam .. *Appellant** (*Defendant*)

v.

Rengaswami Aiyangar .. *Respondent* (*Plaintiff*).

Chelliah v. Rengaswami Aiyangar.

Inam granted by mahajans owning dharmasanam *village to persons rendering* vyravi *service in temple as emoluments—Lands not alienable—Mortgage of lands—Invalidity.*

The mere fact that it is the *Mahajans* owning a *Dharmasanam* village that made a grant of lands in the village to persons rendering service in a temple as emoluments instead of a Zamindar will not make the grant any the less a service inam.

Alienation of land granted for service in a temple is invalid as opposed to public policy and it makes no difference whether the alienation is by way of a sale or by way of a mortgage.

Anjaneyalu v. *Sri Venugopala Rice Mill, Ltd.*, (1922) 42 M.L.J. 477: I.L.R. 45 Mad. 620; *Sundara Raju Dikshatulu* v. *Seshadri Dikshatulu*, (1927) 54 M.L.J. 76 and *Ramanathan Chettiar* v. *Kalidasa Kavandan*, (1936) 71 M.L.J. 398, applied.

Appeal against the decree of the Court of the Subordinate Judge of Devakottai, dated 19th March, 1940, and passed in A.S. No. 38 of 1939 preferred against the decree of the Court of the District Munsiff of Devakottai in O.S. No. 161 of 1939.

K. Umamaheswaram for Appellant.

T. V. Ramiah for Respondent.

The Court delivered the following

JUDGMENT.—The only point for consideration is whether the suit land is an inam land granted for service in a temple and as such not alienable. The appellant is the defendant and the appeal arises out of a suit for enforcing a mortgage deed executed by his father in respect of the plaint mentioned property. The appellant's case was that the land was given to one of his ancestors as a service inam for rendering service in the Vishnu, Siva and Pillayar temples, the service being *Vyravi* service, that is to say purchasing articles, etc., for the use of the temples and cooking pongal in the Pillayar temple. The appellant examined himself and a cousin of his who is also enjoying another portion of the land rendering similar service. Ex. I an old cadjan document was filed as evidencing the grant. The first Court presumed under section 90 of the Indian Evidence Act the document to be a genuine document as an ancient document of 1852, and the evidence of the witnesses showed that there was a service grant and the defendant's family were in enjoyment. The learned Subordinate Judge was of the opinion that the document which purported to be one executed in the year Parithapi might have been executed in 1912 instead of 1852 as was contended for the defendant and, finding that it was not proved to be of the year 1852, refused to presume it to be genuine; and he further stated that even if it was taken as evidence it was not enough to indicate a grant but it would evidence an out and out alienation and at the most it would amount to an alienation burdened with service and consequently the mortgage was valid and binding.

*S.A. No. 760 of 1940. 13th July, 1942.

Chelliah v. Rengaswami Aiyangar.

I do not think the learned Subordinate Judge was right in finding that the document was not proved to have been executed in 1852. From the appearance of the document and also from the evidence of D.W. 1 that it was executed a long time ago to his ancestor he ought to have found that it was a document more than 30 years old and so genuine. Apart from the fact that it was produced by D.W. 1 a cousin of the defendant there are other circumstances which go to show that the document must have been genuine. It is recited therein that the grant was to one Virugu Dasan (an ancestor in the family) for performing the *vyravi* service in the Siva and Perumal temples and cooking pongal to Vigneswara. It is also in evidence that defendant's ancestors were blowing conch in the temples and it is said that they were getting four bundles of unthrashed paddy for every mah of land for blowing conch. That the defendant and his ancestors and D.W. 1 have been blowing conch in these temples is also in evidence. It is spoken to by a number of witnesses on both sides. In these circumstances I think the Subordinate Judge was wrong in finding that the document was not genuine. If Ex. I is presumed to be genuine, the recitals in it and the evidence of D.Ws. and P.Ws. 2 and 3 are enough to indicate that these lands have been enjoyed by the defendant, his cousin and their ancestors as emoluments for performing service in the three temples of the village.

The Subordinate Judge was of opinion that this is a case of a private land and that it could not be held to be a service grant. This is what he says:

"I have not also been referred to any case in which such a *private* alienation of a *private* land by a *private* owner has been held to be a service grant".

Admittedly the village is a Dharmasanam village, that is to say, village granted to Brahmins; and Ex. I purports to have been executed by the persons who have signed it on behalf of the entire Brahmin Mahajans (*Asesha Vidwa Mahajanams*). The learned Subordinate Judge concedes that if a zamindar had granted such an inam, it would be a valid service inam given for service in the temple and might be inalienable. The mere fact that in this case the grantor was the Mahajans instead of a zamindar will not make the grant any the less a service inam. A zamindar when he makes a grant is a private person making a grant of his private property. So also with the Mahajans to whom the Dharmasanam village belonged. I find there is nothing in the fact that the land was granted by the Mahajans of the village to persons who were rendering service in the temple as emoluments for such service, which will make it invalid as a service inam disentitling the holder from alienating the property.

The Subordinate Judge also considers that the alienation will be valid so long as the service is being performed; but this is a case of alienation by a person who is dead and it is his successor that is questioning it. He is not bound to do service if he does not get the emoluments. He is entitled to say that the alienation by his father is not binding on him. It has been held in a number of cases that alienation of land granted for service in

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temples is invalid as opposed to public policy: *Anjaneyalu* v. *Sri Venugopala Rice Mill, Ltd.*[1] In *Sundara Raju Dikshatulu* v. *Seshadri Dikshatulu*[2] it was pointed out that the test is whether the alienation in effect places the income from the lands beyond the disposal of the holder of the office and prevents him from enjoying the emoluments which were intended to go to the holder of the office in order to enable him to discharge his duties properly. In *Ramanathan Chettiar* v. *Kalidasa Kavandan*,[3] which was also a case of mortgage it was contended that this objection to alienation applied only to sales and not mortgages and it was held that even a mortgage of temple service inam land was invalid as opposed to public policy, at any rate, where the mortgage does not provide for payment to the institution or in support of the service a sum not less the net assessment of the land. There is no such provision here.

In these circumstances I find that the Subordinate Judge was wrong in holding that the mortgage was valid on the ground that it was not opposed to public policy and I agree with the first Court that the mortgage was invalid being of an inam granted for doing service in a temple.

The appellant also raised an objection to the finding of the lower appellate Court on the question whether the mortgage was executed for debts incurred for purposes binding on the mortgagor's son. The lower appellate Court has found in favour of the plaintiff and, being a finding of fact, this Court cannot interfere with it.

In the result this second appeal is allowed, the decree of the lower appellate Court is set aside and the decree of the first Court is upheld. The respondent will pay the appellant's costs in this and the lower appellate Court.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

Nallaiya Goundan .. *Appellant** (*Plaintiff*)

v.

Marappa Goundan .. *Respondent* (*Defendant*).

Nallaiya Goundan v. Marappa Goundan

Provincial Insolvency Act (V of 1920), sections 34 and 44 (2)—Contingent liability to indemnify surety—If debt provable in insolvency extinguished by an order of discharge.

The liability of a principal debtor to indemnify the surety though contingent is one provable in the insolvency of such debtor and consequently under section 44 (2) of the Provincial Insolvency Act an order of discharge granted in the insolvency proceedings absolves the insolvent from his liability to the surety.

Gangadhar v. *Kanhai*, (1928) I.L.R. 50 All. 606, followed.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in A.S. No. 309 of 1940 (A.S. No. 298 of 1938, District Court, Trichinopoly) preferred against the decree

1. (1922) 42 M.L.J. 477: I.L.R. 45 Mad. 620.
2. (1927) 54 M.L.J. 76.
3. (1936) 71 M.L.J. 398.

*S.A. No. 1325 of 1941. 27th July, 1942.

of the Court of the District Munsiff of Karur in O.S. No. 370 of 1936. Nallaiya Goundan v. Marappa Goundan.

B. V. Viswanatha Aiyar for Appellant.

L. A. Gopalakrishna Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The only question for consideration in this appeal is whether the order of discharge obtained by the respondent in the proceedings in insolvency in which he was adjudged an insolvent discharged him from the liability in respect of which he has been sued in the suit from which this appeal arises.

The appellant and the respondent and another executed a promissory note for Rs. 600/to a bank. The bank obtained a decree and a portion of the debt was recovered. The respondent was later adjudged an insolvent and he subsequently obtained an order of discharge. The bank assigned the decree to a third person to whom the appellant had to pay money. This was after the order of discharge was passed. It is not disputed that so far as the amount paid by the appellant is concerned it is an amount payable by the respondent and therefore recoverable by the appellant as money paid by him as surety for the respondent.

The respondent's contention was that this liability which was incurred prior to the insolvency was extinguished by the order of discharge granted in the insolvency proceedings. Under section 44 (2) of the Provincial Insolvency Act:

> "Save as otherwise provided by sub-section (1) an order of discharge shall release the insolvent from all debts provable under this Act."

Debt provable under the Act is defined in section 34 (2) which runs thus:

> "Save as provided by sub-section (1) all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts proveable under this Act."

The question for consideration is whether this liability of the respondent to indemnify the plaintiff as his surety is a liability which was provable under the Act or not. That a surety like the appellant is a creditor for the purpose of insolvency is pointed out in *Roderigues* v. *Ramaswami Chettiar*.[1] But it is urged that that was a case of fraudulent preference and that he was considered to be a creditor within the meaning of that expression in that particular section relating to fraudulent preference. It cannot be said that he is a person to whom any provable debt was due in respect of which he could have obtained a dividend as no liability arose till he actually paid the amount to the original creditor. In *Gangadhar* v. *Kanhai*[2] their Lordships had to consider this very same question and it was held by that Court on the interpretation of the language of section 34 of the Provincial Insolvency Act that though this was a contingent liability it was a liability which is defined as being provable under the Act and consequently under section 44 (2) an order of discharge

1. (1916) 32 M.L.J. 253: I.L.R. 40 Mad. 783 (F.B.).
2. (1928) I.L.R. 50 All. 606.

Nallaiya Goundan v. Marappa Goundan.

absolved him from this liability also. It is true that under the English law such a surety had only a right to obtain a declaration that the insolvent was bound to discharge that debt. He could not prove the debt in the sense that he could prove it and claim dividend out of the realisations of the estate of the insolvent. Even in India it is so. He could not prove the claim and ask for a dividend being paid to him on the ground that he was a surety for the insolvent. But this is not what we are concerned with. His inability to claim a dividend after proof cannot stand in the way of this liability being one which comes within the purview of section 34 (2). This is a case of contingent liability. The liability can be enforced only if the surety is made to pay the amount. But the fact that it is contingent and the contingency had not occurred does not make it any the less a liability provable under the Act. In these circumstances I do not see any reason to differ from the finding of the Allahabad High Court in the ruling in *Gangadhar* v. *Kanhai*.[1] In the result, the second appeal fails and is dismissed with costs.

Leave to appeal is refused.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The Public Prosecutor .. *Appellant**

v.

Bhasker Kamath .. *Respondent (Accused).*

Public Prosecutor v. Bhasker Kamath.

Madras Local Boards Act (XIV of 1920), *sections* 193 *and* 207—*Manager of company—Working boiler without licence—Prosecution—Sustainability—"Owner" and "occupier"—Meaning.*

The accused who was the manager of a sugar company was called upon by the Panchayat Board to take out a licence for working his boiler. On his failing to do so he was prosecuted under section 193 read with section 207 of the Madras Local Boards Act.

Held, that the accused was neither the owner nor the occupier within the meaning of the sections and that he was not liable to be prosecuted for working the boiler without a licence.

Appeal under section 417 of the Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the Court of the First Class Bench of Magistrates of Udipi in B.C. No. 227 of 1941 on its file.

Appellant in person.

A. V. Narayana Pai for Respondent.

The Court delivered the following

JUDGMENT.—The appellant, as the manager of the Kallianpur Sugar Mills, Limited, was called upon by the Panchayat Board of Kallianpur to take out a licence for working his boiler. This he failed to do; and so he was prosecuted under section 193 read with section 207 of the Madras Local Boards Act. His vakil raised a preliminary objection before the Bench of Magistrates at Udipi that he, as manager, was not liable under that section; for section 193 read with section 207 makes punishable failure to take out a licence only by the owner or occupier. The Crown has appealed.

1. (1928) I.L.R. 50 All. 606.
*Crl.A. No. 18 of 1942. 20th March, 1942.

Public Prosecutor v. Bhasker Kamath.

"Owner" is defined in the Act as including "the person for the time being receiving or entitled to receive, whether on his own account or as agent, trustee, guardian, manager . . . . the rent or profits of the property in connection with which the word is used. . . ." From this it is seen that although a manager may under certain circumstances be deemed to be the owner, it is not every manager who is an owner for the purposes of this Act; but only such manager as is entitled to collect the rents or profits of the property. Presumably the accused was not entitled to collect the rents and profits; he was running his business for the profits of the Kallianpur Sugar Mills, Limited of which he was merely the manager, appointed for the purpose of seeing that the business was satisfactorily worked.

"Occupier" is not defined in the Local Boards Act, but the definition of that word in the District Municipalities Act expresses what I think to be the ordinary meaning of that word and may be taken as a very fair definition of that term. "Occupier" according to section 3 (15) of the District Municipalities Act, includes,

"any person for the time being paying or liable to pay to the owner, the rent or any portion of the rent of the land or building or part of the same in respect of which the word is used."

The accused clearly does not satisfy the extended definition of "occupier" in that section, and I do not think it can fairly be said that having reference to the ordinary meaning of "occupier", it can be said that a servant occupies the premises of his master. That is what the learned Magistrates of the Bench have held; and I think they are right.

The appeal therefore fails and is dismissed.

B. V. V. ——— *Apppeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Jambulingam Pillai .. *Petitioner** (*Accused*).

Jambulingam Pillai, *In re.*

Motor Vehicles Act (IV of 1939), *sections* 78 *and* 112—*Offence under—Essentials of—Exceeding prescribed speed limit—Proof of fixing of limit—Sign post on road fixing maximum limit—Presumption as to exercise of power by proper authority—Whether can be acted upon.*

In order to bring home the offence under section 78 read with section 112 of the Motor Vehicles Act to the accused the prosecution has to prove two things; first that a certain speed has been laid down under the Motor Vehicles Act as the maximum speed that a vehicle should attain, and secondly that the driver in question had exceeded the speed limit. In such a case it is not sufficient to prove the speed limit that there were two posts on the road on which the number 10 was painted to indicate that the speed should not exceed 10 miles an hour. It has further to be proved that the speed had been fixed by some authority empowered to fix a speed under section 71 (2) of the Act. Where that fact is not proved, the Court cannot convict the accused on the presumption that the sign post was put up in exercise of the power by the proper authority.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to

*Crl.R.C. No. 347 of 1942. (Crl.R.P. No. 337 of 1942). 31st August, 1942.

Jambulingam Pillai, *In re.*

revise the judgment of the Court of the Sub-Divisional Magistrate of Devakottai, in C.A. No. 45 of 1941 (C.C. No. 542 of 1941, Taluk Magistrate, Tirupathur).

C. K. Venkatanarasimham for Petitioner.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner was convicted by the Stationary Sub-Magistrate of Tirupathur of an offence punishable under section 78 read with section 112 of the Motor Vehicles Act and sentenced to pay a fine of Rs. 8. The conviction and sentence were upheld in appeal by the Sub-Divisional Magistrate of Devakottai.

The gravamen of the offence with which the petitioner was charged was that he exceeded the speed limit laid down under the Motor Vehicles Act. That speed limit is ordinarily 30 miles an hour under the VIII Schedule; but the Provincial Government or some authority specially authorised can prescribe lower limits for certain areas under section 71 (2) of the Motor Vehicles Act and the lower speeds are fixed by notification in the Gazette. In order to bring home this offence to the accused the prosecution have to prove two things: (1) that a certain speed has been laid down under the Motor Vehicles Act as the maximum speed that a vehicle should attain, and (2) that the driver in question has exceeded that speed limit.

The proving of the first of these points is, of course, just as important as the proving of the second. The only evidence let in by the prosecution on that point is that of a Traffic Sub-Inspector of Police who says that within the Karaikudi Municipality there are two posts in cement on which are painted the numbers "10" to indicate that the speed should not exceed 10 miles an hour. He had however further to prove that that speed had been fixed by some authority empowered to fix a speed under section 71 (2) of the Motor Vehicles Act. No attempt was made to prove that. The learned Magistrate thought that the fact that the vehicles were warned by these sign posts not to exceed 10 miles an hour proved that the Municipal Commissioner had fixed that speed and that the Commissioner would not have fixed that speed unless he had had proper authority for doing so. These are very big presumptions to make; and I think that the accused is entitled to say that the prosecution did not prove its case.

The petition is allowed and the conviction and sentence set aside. The fine, if paid, will be refunded.

B. V. V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

R. Srinivasa Thathachariar .. *Appellant** (*22nd Deft.*)

v.

Minor Sivasubramania Chettiar, by next friend, Veerappa Chettiar *Respondent* (*2nd Plff.*)

Srinivasa Thathachariar *v.* Sivasubramania Chettiar.

Madras Agriculturists' Relief Act (IV of 1938), section 7—Portion of hypotheca purchased by an "agriculturist" and the rest of it by a non-agriculturist—Debt scaled down in so far as "agriculturist" purchaser was concerned—Redemption of whole of the property by "agriculturist" purchaser—If permissible.

As the result of certain proceedings in execution of decrees obtained by third parties against a mortgagor a portion of the hypotheca passed to *X* who was an agriculturist and the rest of the hypotheca passed to *Y* who was not an agriculturist. The mortgagor who was also not an agriculturist thus ceased to have any interest in the mortgage security.

In a suit by the mortgagee impleading *X* and *Y* a preliminary decree for sale was passed on 16th August, 1937, for Rs. 37,772, and when Madras Act IV of 1938, came into force, on an application made by *X*, the decree was amended so far as *X* was concerned by scaling down the amount declared due to Rs. 6,638-8-3 including costs, the rest of the decree being left intact. After a final decree was passed in November, 1939, the mortgagee applied for execution by sale of the properties against *X* and *Y*. While the execution petition was pending *X* deposited in Court the sum of Rs. 6,638-8-3 and the execution costs for payment to the mortgagee on condition that he was allowed to redeem the whole of the mortgage security so as to enable him to claim contribution from *Y* for a rateable proportion of the sum paid. He also filed an application for entering satisfaction of the decree as a whole. In the circumstances,

Held: *X* is not, on payment of the scaled down amount, entitled to redeem the whole mortgage as the security must be deemed to be split up in such cases in order to give effect to the provisions of Madras Act IV of 1938 which benefits only agriculturist debtors and does not affect remedies against debtors who are not agriculturists. *Ramier* v. *Srinivasiah*, (1940) 2 M.L.J. 872, followed:

The principle laid down in *Arunachalam* v. *Seetharam*, I.L.R 1941 Mad. 930: (1941) 1 M.L.J. 561, *Nachiappa Chettiar* v. *Ramachandra Reddiar*, (1942) 1 M.L.J. 510 and *Marina Ammayi* v. *Mirza Bakhar Beg Sahib*, (1941) 1 M.L.J. 547 [that where an agriculturist mortgagor redeems the mortgage by paying the mortgage money as scaled down under the Act, a purchaser of a portion of the hypotheca is also benefited under the general law by reason of the whole property being relieved of the incumbrance, although such purchaser is not an agriculturist and cannot himself claim the benefit of the Act] cannot be extended to a case like the present where the mortgagor is not an agriculturist and the question arises between purchasers of different portions of the hypotheca, some of whom are and the others are not agriculturists.

The mortgagee's right to recover the full amount of the debt from the properties in the hands of *Y* cannot be nullified in order to safeguard *X's* possible right of recovering contribution from *Y*.

Appeal against the order of the Court of the Subordinate Judge of Tanjore, dated 17th April, 1941, and made in E.A. No. 13 of 1940 in O.S. No. 35 of 1935.

A. V. Viswanatha Sastri for Appellant.

R. Gopalaswami Aiyangar for Respondent.

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*A.A.O. No. 494 of 1941. 17th September, 1942.

Srinivasa Thathachariar v. Sivasubramania Chettiar.

Patanjali Sastri, J.

The Judgment of the Court was delivered by

PATANJALI SASTRI, J.—This appeal raises the question whether a purchaser of a portion of mortgaged property who is an "agriculturist" within the meaning of the Madras Agriculturists' Relief Act is entitled to redeem the whole of the property on payment only of the scaled down amount of the debt, so as to prevent the mortgagee from recovering the mortgage money in full from the rest of the hypotheca in the hands of a non-agriculturist purchaser from the mortgagor.

One Ramaswami Chetty now represented by the respondent brought the suit out of which this appeal arises to enforce a mortgage executed in his favour on 7th November, 1917, for Rs. 4,000 repayable with interest at 12 per cent. per annum with yearly rests. The mortgage comprised a house and a village with its hamlets. As the result of certain proceedings in execution of decrees obtained by third parties against the mortgagor a portion of the mortgaged house worth about Rs. 1,000 passed to the appellant (22nd defendant) who is an "agriculturist", and the rest of the hypotheca to the 18th defendant who is not an "agriculturist". The original mortgagor who is also not an "agriculturist" has thus ceased to have any interest in the mortgage security. A preliminary decree for sale in the usual form was passed on 16th August, 1937, for Rs. 37,772, but as the Madras Agriculturists' Relief Act came into force in March, 1938, an application was made by the appellant in July, 1938, to have the decree amended by scaling down the amount payable in accordance with the provisions of that Act, and the decree was amended "so far as the 22nd defendant is concerned" by scaling down the amount declared due to Rs. 6,638-8-3 including costs. No consequential amendments, however, were made in the rest of the decree which was otherwise left intact. None of the defendants having paid the amount due within the date fixed, a final decree in the usual form followed in November, 1939, and the respondent applied in December, 1939, for execution of the decree by the sale of the mortgaged properties against the appellant and the 18th defendant, the other defendants being no longer interested in the hypotheca. While the execution petition was pending, the appellant deposited in Court the sum of Rs. 6,638-8-3 and the execution costs, or Rs. 6,655 in all, for payment to the respondent on condition that he was allowed to redeem the whole of the mortgage security so as to enable him to claim contribution from the 18th defendant for a rateable proportion of the sum paid. He also filed an application (E.A. No. 13 of 1940) for entering satisfaction of the decree as a whole. The Court below, however, refused to allow the appellant to redeem the entire mortgaged properties on payment only of the scaled down amount of the debt as the 18th defendant who had become the owner of the bulk of such properties was not an "agriculturist" and was, therefore, liable to pay out of such properties the balance of the decree amount. It accordingly dismissed E.A. No. 13 of 1940. The present appeal has been preferred from this order.

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It is argued by Mr. A. V. Viswanatha Sastri for the appellant that the mortgage debt having been scaled down so far as the appellant was concerned under the provisions of the Madras Agriculturists' Relief Act and the mortgage security being indivisible, the appellant was entitled to redeem the security as a whole on payment of the amount found payable by him, and that the Court was bound to enter satisfaction of the whole decree. We are unable to accede to this argument. As already observed, the decree has been scaled down only so far as the appellant is concerned and has been left intact as against the 18th defendant who is not an "agriculturist". This is in accordance with our decision in *Ramier* v. *Srinivasiah*[1] which indeed, ruled this case. It is there laid down that, having regard to the *non-obstante* clause in section 7 of the Act, the principle that a mortgage is indivisible and can only be redeemed as a whole has to be trenched upon to the extent necessary for giving effect to the provisions of the Act in cases like the present where the mortgagor is not an "agriculturist" and a person deriving title from him and bound by the mortgage is an "agriculturist", and the judgment proceeds to indicate the lines on which the decree in such cases will have to be framed; that is to say, the decree will have to declare separately the amount payable by the agriculturist judgment-debtor as scaled down under the Act, and provide that, on payment of such amount by him, the property in which he is interested will not be liable to be sold or foreclosed and that, in default of such payment by him within the time fixed, such property will be sold only for the recovery of that amount, the rest of the hypotheca being liable to be sold for the full amount of the decree. We wish to observe here, in view of the criticism directed by Mr. Viswanatha Sastri against the form of the decree there indicated, that it was intended only to point out the main lines on which the decree will have to proceed in the circumstances of that case, and was not intended to embody exhaustively all the provisions which it should contain to meet various eventualities, provisions such as usually find place in a preliminary decree for sale the central principle to be borne in mind being indicated in the concluding portion of the judgment, *viz.*, that the form to be adopted should be such as "will give to the agriculturist judgment-debtor the full benefit of the relief to which he is entitled under the Act and will safeguard the rights of the decree-holder as against those judgment-debtors who are not entitled to the benefits of the Act." It follows that the appellant is not, on payment of the scaled down amount, entitled to redeem the whole mortgage as the security must be deemed to be split up in such cases in order to give effect to the provisions of the Act which benefits only agriculturist debtors and does not affect remedies against debtors who are not agriculturists.

Mr. Viswanatha Sastri placed reliance on the line of cases where it has been held by this Court that when an agriculturist mortgagor redeems the mortgage by paying the mortgage money as scaled down under the Act, a purchaser of a portion of the

1. (1940) 2 M.L.J. 872.

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hypotheca is also benefited under the general law by reason of the whole property being relieved of the incumbrance, although such purchaser is not an agriculturist and cannot himself claim the benefit of the Act, vide *Arunachalam* v. *Seetharam*,[1] *Nachiappa Chettiar* v. *Ramachandra Reddiar*[2] and *Marina Ammayi* v. *Mirza Bakhar Beg Saheb*[3] and argued that the same principle should be applied here as the appellant, having regard to section 59-A of the Transfer of Property Act, stood in the same position as the mortgagor for the purpose of applying the provisions of that Act relating to mortgages, and was under section 91, entitled to redeem the whole mortgage although the 18th defendant, the purchaser of the rest of the hypotheca, might indirectly be benefited by such redemption in that he might have to pay to the appellant only a rateable proportion of the scaled down debt by way of contribution. Mr. Viswanatha Sastri further submitted that unless the right to redeem the entire mortgage security by paying the reduced amount is conceded to the appellant, it was highly doubtful whether the latter could successfully claim contribution from the 18th defendant, for unless the mortgage is redeemed in full, the last paragraph of section 92 might stand in the way of the appellant making such a claim. It was urged that this would be anomalous as it would, in effect, deprive the appellant of the benefit which the Madras Agriculturists' Relief Act was undoubtedly intended to confer upon him; for, the scaling down of the debt would be of no benefit to him if he had to pay Rs. 6,655 to save from execution sale property which was worth much less, unless he could recover from the rest of the hypotheca a rateable contribution. This argument looks somewhat plausible but we have to come to the conclusion that it is fallacious and should not be accepted. While it is true that, generally speaking, the provisions of the Transfer of Property Act relating to mortgages are applicable alike to mortgagors and to persons deriving title from them, the Act itself recognises the difference between their respective positions for some purposes, *e. g.,* in section 92. Although it has been held by this Court that the liability of a purchaser of a part of the hypotheca who is an agriculturist to pay the mortgage money out of the property purchased is a "debt" within the meaning of the Madras Agriculturists' Relief Act, it cannot be said that he stands in relation to the mortgagee in the same position for all purposes as the original mortgagor who borrowed the debt. In the case of the latter, if he pays the scaled down amount, the contractual relation of debtor and creditor is put an end to and no part of the debt can subsist thereafter, with the result that the property which under the mortgage contract is charged with the due payment of that debt becomes into whosoever hands it may have passed, freed from the burden of the charge. The decisions referred to above proceed on this principle. But when a purchaser of part of the hypotheca, being an agriculturist, pays the scaled down amount of the debt, there is no obvious reason why the debt

1. (1941) 1 M.L.J. 561: I.L.R. 1941 Mad. 930.
2. (1942) 1 M.L.J. 510.
3. (1941) 1 M.L.J. 547.

should be regarded as wiped out even as against the mortgagor, or a person deriving title from him, who is not an agriculturist; for, the Agriculturists' Relief Act is clearly intended to benefit only agriculturist debtors and it nullifies the rights of creditors and overrides the general law only to the extent necessary for giving effect to its provisions and no further. The very argument of Mr. Viswanatha Sastri based upon section 92 of the Transfer of Property Act serves to emphasise the distinction between the position of the original mortgagor and that of a purchaser of part of the hypotheca. If an agriculturist mortgagor is allowed to redeem the mortgage as a whole by paying the scaled down amount, he would not have the right of subrogation under section 92 and there would be no question of his claiming to recover any portion of the amount paid by him from a non-agriculturist purchaser of a part of the hypotheca who may be indirectly benefited by such redemption; whereas the result of allowing an agriculturist purchaser of part of the hypotheca to redeem the entire mortgage by paying the scaled down amount of the debt might well be to enable him under section 92 to proceed against the rest of the hypotheca in the hands of a non-agriculturist not merely for contribution in respect of the reduced amount paid by him but for the full amount of the mortgage debt; or, in other words, the appellant might, if his contention were accepted, claim from the 18th defendant not merely rateable contribution on the basis of the Rs. 6,655 deposited by him into Court, but, having under section 92, "the same rights as the mortgagee whose mortgage he redeems", he might well claim to recover the full amount of the mortgage debt by the sale of the rest of the hypotheca, which rather makes a *reductio ad absurdum* of the argument. It was suggested that the appellant, having claimed to redeem the whole mortgage on the footing of Rs. 6,655 being the only amount payable under it, would be held estopped from claiming as against the 18th defendant that any larger amount was due. It is, however, difficult to see how any estoppel can arise, as the appellant could not be taken to have represented that the amount payable under the mortgage was the reduced sum as against the 18th defendant in respect of whose liability there was no scaling down.

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As regards the argument that the scaling down of the debt would be of no benefit to the appellant in the circumstances of this case unless he is allowed to redeem the mortgage as a whole so as to enable him to claim contribution from the 18th defendant, it is to be observed that a claim to contribution would arise only if the 18th defendant is benefited by the payment made by the appellant which can be ascertained only when the mortgage security is realised. If the mortgaged properties in the hands of the 18th defendant are sold up for discharging the balance remaining due under the mortgage, no question of the appellant recovering any contribution could arise. If it is found, however, that the mortgagee has realised his debt from the different parcels of the mortgaged property in the hands of the appellant and the 18th defendant otherwise than according to their rateable share of the mortgage debt, we see no obvious reason

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why a claim for contribution by the appellant under section 82 of the Transfer of Property Act should be defeated merely because he has not been allowed to redeem the whole mortgage on payment of the scaled down amount. Be that as it may, we cannot agree that the mortgagee's right to recover the full amount of the debt from the property in the hands of the 18th defendant should be nullified in order to safeguard the appellant's possible right of recovering contribution from the 18th defendant. It may be that in certain circumstances the relief provided in the Agriculturists' Relief Act is of no practical benefit to an agriculturist debtor but the latter cannot claim in seeking such relief that the creditor's rights should be prejudiced to a greater extent then the provisions of the Act clearly warrant.

For the reasons indicated, we do not consider that the principle of the decisions relied on for the appellant should be extended to cases like the present where the mortgagor is not an agriculturist and the question arises between purchasers of different portions of the hypotheca, some of whom are, and the others are not, agriculturists.

In the result, the appeal fails and is dismissed with costs.

Mr. Viswanatha Sastri submitted that it should be made clear that, in the event of the appeal being dismissed, the appellant would be entitled to withdraw the amount deposited by him in Court as provided in the order of Horwill, J., dated the 9th October, 1941, in C.M.P. No. 5115 of 1941. As the said order entitled the respondent to draw the money unconditionally "without prejudice to the claim of the petitioner" (*i.e.*, the appellant herein) "to demand it back in case he is unsuccessful in the appeal," the appellant will be entitled to get back the amount if he has not already recovered it from the respondent as we are dismissing the appeal.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN AND MR. JUSTICE SOMAYYA.

Goverdhandoss Tokersey ... *Appellant** (*Plaintiff*)

v.

M. Abdul Rahiman and another .. *Respondents* (*Defendants*).

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Principal and agent—Power of attorney—Construction—Power to sell—Whether includes power to receive price—Unauthorised transaction with third party—Money advanced by agent—Contract remaining unfulfilled—Suit by principal for refund of advance—Maintainability—Partnership Act (IX of 1932), section 69 (2)—Bar under—Applicability to suit by partner in individual name.

The provisions of section 69 (2) of the Indian Partnership Act should be strictly construed. They could only be attracted to a suit if it was instituted either by or on behalf of a firm, that is to say, if *ex facie* it purports to be filed either by or on behalf of the firm or even in the interests of the firm. But this must be clear from the plaint itself and must not in any case depend on the liability of a plaintiff to restore the benefit

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that he has received out of that suit to the firm of which he is a partner eventually.

Lindley on Partnership 10th ed., page 350 and *Jose Joaquim Agacio* v. *Paul S. Forbes*, (1861) 14 Moo.P.C.Rep. 160: 15 E.R. 267, relied on.

The Court is not bound to dismiss a suit on the ground of non-registration of a firm *suo motu* even if no plea had been raised by any of the defendants to the suit. But a plea as to non-maintainability of the suit or such a ground can be raised for the first time in appeal if all the facts necessary for its determination are on the record.

An agent authorised under a power of attorney to sell must not only be taken to have authority to do every lawful thing which is necessary to effect a sale but also to do what is usually done in the course of conducting a sale. The power to receive the price must be ordinarily, and in the absence of any stipulation or direction to the contrary, considered to be implicit in the power of sale.

Narasimhulu Chetti v. *Sundaracharíar*, (1910) 20 M.L.J. 479, *Mynne* v. *Joliffe*, (1834) 42 Rev. Rep. 802 and *Viney* v. *Chaplin*, (1858) 27 L.J. Ch. 434, considered.

Where an agent entered into a contract with a third party and subsequently the principal sued for recovery of monies advanced by the agent to the third party on the ground that the agent was not authorised to enter into the transaction without his specific authority and it was also shown that the conract remained unfulfilled,

Held, that the plaintiff was entitled to recover the advance made in pursuance of the agreement with the third party.

Appeal against the decree of the Court of the Subordinate Judge of the Nilgiris at Ootacamund in O.S. No. 52 of 1938.

K. Rajah Aiyar and *R. Swaminatha Aiyar* for Appellant.

B. Sitarama Rao and *T. Krishna Rao* for Respondents.

The Judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.—This appeal arises out of a suit for refund of Rs. 8,700 stated to have been advanced by the 3rd defendant as an agent of the plaintiff to the 1st defendant at the time of the execution of the agreement (Ex. J) on the 9th November, 1936. Under the terms of this agreement, the 1st defendant who held a general power of attorney, dated the 24th March, 1936 from the 2nd defendant, agreed to sell to the 3rd defendant as an agent of the plaintiff 30 tons of sandalwood that may be got ready by the former out of the two estates (Benhope and Killiard), belonging to his principal in a period of one year at Rs. 800 per ton and any further quantity of wood that may be available out of the aforesaid estates at Rs. 780 per ton. The sum of Rs. 7,800 was acknowledged to have been received by way of an advance in Ex. J and was agreed to be adjusted at the time when the goods were delivered to the 3rd defendant on behalf of the plaintiff at the rate of Rs. 100 per ton. The agreement also provided for a liquidated damage at Rs. 150 per ton if either of the parties failed to deliver or take the goods mentioned in the agreement. On the same date another varthamanam letter (Ex. J-2) was executed by the 3rd defendant as an agent of the plaintiff in favour of the 1st defendant as the power of attorney agent of the 2nd defendant under which six tons of sandalwood (not covered by the agreement Ex. J) were sold at the rate of Rs. 810 per ton and were agreed to be delivered before the 30th November, 1936. The 3rd defendant communicated the terms

of the agreement Ex. J to his principal in Bombay the very next day (Ex. F-14) in which he referred to a sum of Rs. 8,700 having been paid by way of an advance to the 1st defendant towards this contract. A sum of Rs. 5,000 was stated to have been paid in cash and the balance of Rs. 3,700 that was due by the 1st defendant to the plaintiff in respect of certain previous dealings was said to have been taken into account towards the advance. The plaintiff sent a telegram (Ex. F-15) in reply on the 13th November, 1936, in which he expressed his surprise at the 3rd defendant's failure to act in accordance with the instructions contained in the former's letter (obviously referring to the letter, dated the 3rd November, 1936—Ex. F-11), refused to accept the terms communicated to him in Ex. F-14 and asked the 3rd defendant to cancel the agreement. The 3rd defendant was also forbidden by the plaintiff to pay Rs. 5,000 to the 1st defendant. But the sum of Rs. 5,000 or, as it really transpired later, the sum of Rs. 4,600 had already been paid to the 1st defendant on the date on which Ex. J was executed. On the receipt of the telegram Ex. F-15, the 3rd defendant wrote to the 1st defendant on the 15th November, 1936, Ex. H in which the plaintiff's refusal to abide by the agreement was duly communicated and the sum of Rs. 5,000 alleged to have been paid to the 1st defendant was asked to be adjusted towards the price of the six tons of sandalwood covered by the agreement, Ex. J-2. This letter was not acknowledged by the 1st defendant. The 3rd defendant was thus constrained to write another letter on the 30th November, 1936, (Ex. V) in more or less the same terms. This was taken by the 1st defendant to Mr. Ramamurthy, an Advocate at Ootacamund who sent a reply to the 3rd defendant (Ex. K). In this letter the sum of Rs. 5,000 was acknowledged to have been received in cash and the 3rd defendant's contention that the agreement Ex. J, had been entered into subject to the condition of its being ratified by the plaintiff was repudiated. The 1st defendant expressed his readiness and willingness to abide by the terms of the agreement and threatened to make the 3rd defendant and his principal (the plaintiff) liable if they persisted in committing a breach of the agreement. On the same date a copy of the reply sent to the 3rd defendant was sent to the plaintiff's lawyer at Bombay (Ex. K-1) in which a copy of Ex. K was enclosed. This was taken or sent by the plaintiff to Messrs. Payne & Co., Solicitors of Bombay for reply. They wrote Ex. L and Ex. L-1 on the 23rd December, 1936, to the 1st and 2nd defendants respectively. In these letters, the 3rd defendant's authority to enter into "any contract with any person" without the plaintiff's express authority and sanction was denied and the agreement was said to have been brought about under some kind of pressure and coercion to which the 3rd defendant was alleged to have been subjected. In the end it was asserted that the agreements were conditional on the plaintiff's approval and as he had repudiated them on the 15th November, 1936, they were no longer binding. The allegations contained in these letters were denied by the defendants in the letters written by their lawyer on the 23rd January, 1937, (Ex. L-2 and Ex. L-3).

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The present suit was instituted by the plaintiff on the 16th February, 1938, with the allegations that the 3rd defendant was not entitled to enter into any agreement on behalf of the plaintiff and that in doing so, he had not only acted beyond the scope of his authority but in direct contravention of the plaintiff's instructions. The 2nd defendant was attempted to be made liable for the refund of the amount of Rs. 8,700 which formed the consideration of Ex. J as the 1st defendant held a power of attorney from the 2nd defendant and had acted within the scope of his authority.

The 1st defendant in his reply contended that the 3rd defendant had been for a long time acting on behalf of the plaintiff in such matters and that the agreement was fully within the scope of his authority. And since the breach of the contract by the plaintiff and the 3rd defendant was alleged to be unjustified and the 1st defendant's readiness and willingness to abide by the terms of the contract reaffirmed, the whole of the advance of Rs. 8,700 was claimed to have been forfeited. A sum of Rs. 1,715-8-0 was claimed on behalf of the 1st defendant in the alternative as having been suffered by him in consequence of the breach by the plaintiff and the 3rd defendant.

The 2nd defendant in his written statement contended that the 1st defendant had no authority to enter into the contract contained in Ex. J. It was said to be in excess of his powers and the power of attorney referred to by the plaintiff in the plaint was alleged to have been cancelled by the 2nd defendant long before Ex. J came into existence. In the alternative he asked for damages from the plaintiff to the extent of Rs. 5,700.

The plaintiff in his replication, dated the 26th July, 1939, also pleaded a ratification by the 2nd defendant of the agreement entered into by the 1st defendant on his behalf.

Two additional written statements were filed on behalf of the 1st two defendants on the 23rd August, 1939, in which it was contended that the amount for which the suit was brought was not due to the plaintiff personally and the claim for the same could not therefore be enforced by him. In other words, as specified in paragraph 3 of the written statement, the suit was not brought by the proper person and was therefore liable to be dismissed. The plea raised on behalf of the 2nd defendant in his written statement was, if anything, clearer. It was alleged that the suit was instituted by Goverdandoss, the plaintiff in his individual capacity and as he had no right to the suit amount, he was incompetent to file it. It was also alleged in paragraph 3 of the additional written statement that the firm "Goverdandoss Tokersey" had not been registered as required under the Partnership Act at or before the presentation of the suit and that registration was effected only on the 31st July, 1939.

One of these written statements that is, the one filed on behalf of the 1st defendant appears to have been admitted on a condition which appears to be meaningless. The writing of the learned Subordinate Judge is extremely illegible, but the order

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admitting the statement on behalf of the 1st defendant is read by the office as follows:

"Counter filed; not opposed subject to plaintiff being allowed to raise the contention that it is not open to the defendant to revise the memo (written statement) filed".

The other order was unconditional and it gave permission to the 2nd defendant to raise this new defence. Why should these two orders passed on the same day have been different in terms cannot be easily understood unless it be that the Subordinate Judge desired to admit the written statement of the 2nd defendant on the same condition as was imposed by him when he was admitting the additional pleas on behalf of the 1st defendant. Why were pleas of this nature allowed to be raised at all, unless the Subordinate Judge had applied his mind and come to the decision that these ought to be admitted is equally incomprehensible. The issues framed by the Subordinate Judge on the 6th August, 1939, raised points other than those mentioned in the written statements. It is not easy to follow how these issues were framed and why the objection on behalf of the defendants were misunderstood. We take it however that the issues raised by the lower Court merely covered the objections contained in the additional written statements filed on the 23rd August, 1939, and their scope could not be enlarged only because they happen to be vague and indefinite. Objections of this kind should be, if raised, faced by the trial Court and disposed of finally. The pleas should have been either admitted or rejected.

The Subordinate Judge in a judgment which is unnecessarily prolix held that although the power of attorney in favour of the 1st defendant was not proved to have been cancelled until April, 1937, he had no authority to enter into a contract on behalf of the 2nd defendant and that the latter had not ratified the agreement contained in Ex. J. He also found that the 3rd defendant had authority on behalf of the plaintiff to enter into the contract. The contention that the whole of the advance was liable to be forfeited was repelled but the plaintiff was held liable to pay damages suffered by the 1st defendant to the extent of Rs. 1,715-8-0. He also found that out of Rs. 5,000, a sum of Rs. 400 was not paid in cash by the 3rd defendant and that a promissory note for the amount was executed by him in favour of the 1st defendant. In view of his findings the Subordinate Judge ordered the promissory note to be returned by the 1st defendant to the plaintiff and passed a decree for the sum of Rs 8,300 against the 1st defendant after a credit for Rs. 1,715-8-0 found to have been suffered by him as damages was allowed to him. The suit against the 2nd defendant was dismissed. The plaintiff appeals.

Before we go into the various questions raised on behalf of the parties, we should like to examine the contentions advanced on behalf of the defendants 1 and 2 in their additional written statements on the 23rd August, 1939. If the plaintiff's suit is liable to be dismissed on the ground that he had no *locus standi* to maintain the action, it would be unnecessary to examine the other questions.

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The objection that the plaintiff was incompetent to maintain the suit in his individual capacity was based on the assertion that the money advanced under the agreement Ex. J belonged to the firm working under the name and style of Goverdandoss Tokersey—which also happened to be the name of the plaintiff who was a partner thereof. The plaintiff's capacity to institute the suit in his individual name was, for that reason, questioned.

But taking advantage of the issues framed by the lower Court, Mr. Sitarama Rao, learned counsel for the respondents, contended that in so far as the suit was instituted "on behalf of" or in other words, for the benefit of the firm of Goverdandoss Tokersey, it falls within the mischief of section 69 (2) of the Indian Partnership Act (Act IX of 1932) and is liable to be dismissed on that ground. We have already referred to the fact that the plea advanced on behalf of the defendants was only to the effect that Goverdendoss Tokersey who had filed the suit in his individual name was incompetent to do so and not that the suit was by or on behalf of the firm of Goverdandoss Tokersey and was not maintainable in the absence of the firm having been registered. In fact the plea that is now being advanced is directly opposed to what had been raised in the written statements. The contention then was that the suit had been instituted by Goverdendoss Tokersey in his individual capacity and it could not therefore be maintained. The argument that is now urged assumes that the suit had been brought by the plaintiff on behalf of the firm and would be maintainable if the firm had been duly registered before its institution as required by the Indian Partnership Act. The reasons for this change of front are not far to seek. It was not denied on behalf of the plaintiff that the firm of Goverdandoss Tokersey was not registered at the time when the suit was instituted but was registered shortly before this plea was raised on behalf of the defendants. The defendants were fully aware of this fact and had in their written statements even given the date when the registration was effected. In all probability, the plea that the suit was on behalf of the firm and was liable to be defeated on that ground was not raised as one of the learned Judges of this Court had taken the view that the registration of the firm subsequent to the institution of the suit was sufficient and the suit could not be dismissed on that ground, *Varadarajulu Naidu, Kuppuswami Naidu and Co.* v. *Rajamanicka Mudaliar*.[1] That is why the plea that the present suit was on behalf of the firm was not raised and the objection—even if the issue was to be taken literally and as extending the scope of the pleas raised in the written statements—not pressed, as stated by the lower Court, at the time of the arguments. But after the decision of this suit by the lower Court, the view in *Varadarajulu Naidu* v. *Rajamanicka Mudaliar*[1] was dissented from in *Ponnuchami Gounder* v. *Muthuswami Gounder*[2] and an attempt was made to press the objection—although not raised in

1. (1937) 2 M.L.J. 273.
2. (1941) 2 M.L.J. 268.

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the written statements—which happened to be covered by the words of the issue as framed by the trial Court. The contention was attempted to be supported by a statement of one of the partners of the firm of Goverdandoss Tokersey who was examined as a witness on behalf of the plaintiff (P.W. 1). There is no admission, however, in this statement that the contract Ex. J was entered into on behalf of the firm.

When it was pointed out to Mr. Sitarama Rao that the contention now advanced by him was materially different from what was urged by his clients in the lower Court in their additional written statements, he said that it was open to him to raise a point of law for the first time in appeal and that it would be our duty to give effect to it if found to be correct in the same way as it would be our duty to give effect to a plea of limitation even when it has not been raised by a party. He cited a decision of Sind in *Lokramdas Chatomal Firm and others* v. *Tharumal Shevaram*[1] in support of his contention. There is a distinct provision in the Indian Limitation Act that a Court is bound to dismiss a suit on the ground of limitation if it finds the suit to be barred whether a plea of this kind had been raised on behalf of the defendants or not. No such provision however exists in the Indian Partnership Act. It is not therefore quite easy to accept the view that the Court is bound to dismiss a suit on the ground of non-registration of the firm *suo motu* even if no plea had been raised by any of the defendants to the suit. We agree however that a point of law of this nature can be raised for the first time in appeal if all the facts necessary for its determination are on the record. Had we therefore been of the view that there was substance in this contention, we would have had to give effect to it. But on a reading of the plaint we find that the suit was not instituted by or on behalf of the firm but by Goverdandoss Tokersey in his individual capacity and this fact was actually admitted by the defendants in their written statement. Learned counsel for the respondents however contended that this would not be material if the suit was actually filed in the interest of the firm. He urged that such a suit would fall within the ambit of section 69 (2) of the Indian Partnership Act and would be covered by the words "on behalf of the firm" used in that section. We are not impressed by that argument. A stringent provision of this nature has, first of all, to be strictly construed. It is, moreover, immaterial in our opinion, whether the benefit of a suit is to go to any person other than the plaintiff ultimately. The provisions of section 69 (2) of the Indian Partnership Act could only be attracted to a suit if it was instituted either by or on behalf of the firm, that is to say, *ex facie* it purports to be filed either by or on behalf of the firm or even, as urged by Mr. Sitarama Rao, in the interests of the firm. But this must be clear from the plaint itself and must not in any case depend on the liability of a plaintiff to restore the benefit that he has received out of that suit to the firm of which he is a partner eventually. The law has been thus stated in Lindley on Partnership at page 350 (10th edition):

1. A.I.R. 1939 Sind 206.

"One partner may sue alone on a written contract made with himself if it does not appear from the contract itself that he was acting as agent of the firm; and one partner ought to sue alone on a contract entered into with himself, if such contract is in fact made with him as principal, and not on behalf of himself and others".

The Supreme Court of Hongkong had non-suited the plaintiff in *Jose Joaquim Agacio* v. *Paul S. Forbes*[1] on the ground that the suit should have been filed by the firm which was beneficially interested and not by the plaintiff who had entered into the contract. This decision was reversed by their Lordships of the Privy Council who held that the contract having been entered into by the plaintiff personally constituted a personal agreement and that he was entitled to bring the suit in his own name without joining his partners as plaintiffs in the action. The suit could therefore be and was properly instituted by the plaintiff and the defendant's objection that the present suit falls within the mischief of section 69 (2) of the Indian Partnership Act is therefore overruled.

We must now see whether the plaintiff was entitled to bring the suit in his own name. It is true that the agreement Ex. J does not clearly state that the 3rd defendant was acting on behalf of the individual Goverdandoss Tokersey and not on behalf of the firm carrying on business in that name—but on going through the various letters that were exchanged between the various parties to the suit (Ex. F-14, Ex. M, Ex. K, Ex. L and Ex. L-1) there is no doubt left in our minds that the 3rd defendant had entered into the contract Ex. J as an agent and on behalf of the individual Goverdandoss Tokersey and not the firm of that name.

The first important question of fact to decide is whether the 1st defendant was empowered by the 2nd defendant to enter into a contract such as is contained in the agreement Ex. J. The lower Court found (and that finding is not challenged before us) that the power of attorney (Ex. M) had not been cancelled until April, 1937, *i. e.*, for at least five months after this agreement was entered into. The 1st defendant would therefore be entitled to enter into a contract on behalf of the 2nd defendant if he was authorised to do so under that document. The material portion of Ex. M is as follows:—

"You shall cut the sandalwood trees in the undermentioned two estates by employing coolies, sell them according to your like, pay the wages, etc., to the coolies, maintain ledger and day-book accounts in respect of sale, deliver them to me with particulars. You shall yourself sign on my behalf, in the forest Government order, permit, etc., in the undermentioned two estates from this date''.

These two estates are then described in the schedule.

We have already referred to the fact that the sandalwood trees on the two estates known as Benhope and Killiard belonged to the 2nd defendant. They were purchased by him in October and December, 1935, under Ex. XVIII-A and Ex. XV respectively. It was in regard to these sandalwood trees that the power of attorney was executed by the 2nd defendant in favour of the 1st defendant. It was in regard to these sandalwood trees

1. (1861) 14 Moore's P. C. Rep. 160: 15 E. R. 267.

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that he had entered into an agreement with the 3rd defendant under Ex. J.

Learned counsel for the appellant argued the case in this Court against the 2nd defendant both on the basis and independently of this power of attorney. But as, in our opinion, the power of attorney is clear and binding on the 2nd defendant in respect of this transaction, it is unnecessary for us to refer to a large body of other documents to which our attention was drawn by learned counsel for the appellant in this connection. The 2nd defendant was not held liable by the lower Court

(*a*) as the 1st defendant was found to have entered into a contract in regard to 87 tons of sandalwood which it was not possible to supply to the plaintiff out of the two estates;

(*b*) as the terms in the power of attorney were so construed as not to confer any authority on the 1st defendant to enter into a forward contract; and

(*c*) as the 1st defendant was not found to have been authorised under the power of attorney to receive a large sum of Rs. 8,700 as an advance (*vide* paragraphs 20, 21, 22 and 23 of the judgment).

The same grounds have been reiterated by learned counsel for the respondents before us in support of his contention that the 1st defendant could not have been authorised by the 2nd defendant to enter into a contract of the nature contained in Ex. J. He also attacked the contract on the ground that inasmuch as the 1st defendant had been induced to enter into the contract contained in Ex. J by agreeing to make his own principal, the 2nd defendant, liable for the sum of Rs. 3,700 in substitution for his own liability, he must be held to have acted in such a way as came in conflict with his own duty as an agent and the transaction must, for that reason, be held to have been vitiated. We will consider this objection separately and later.

The contention that the 1st defendant had entered into a contract for the supply of 87 tons of sandalwood that was far in excess of the supplying capacity of the two estates is based upon the terms found in Ex. J, that the parties to that document had agreed to deduct Rs. 100 per ton out of the advance received or acknowledged to have been received by the 1st defendant. We are not however prepared to agree with the construction that is being placed on that agreement. It specifically provides for the sale of 30 tons of sandalwood. This was approximately the quantity of wood that was to be found in the two estates. Had the parties been contemplating the supply of wood not out of the two estates but from other sources, we have no doubt that it would have been clearly mentioned in the agreement. A reference to the supply of further wood was obviously made to cover such additional wood as may be available from out of these two estates in addition to the 30 tons which formed the subject of the agreement. It is difficult to infer that the contract was to supply 87 tons of sandalwood simply because Rs. 100 had to be deducted out of every ton of wood delivered by the 1st defendant to the 3rd defendant. The obvious meaning of a provision of that

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nature was that Rs. 100 would be deducted on the delivery of each ton up to 30 tons and the balance would be deducted from out of the price due in respect of such other wood as may be supplied in addition to 30 tons. It is unreasonable to assume that a contract for the supply of 57 tons would have been left so vague and indefinite if the idea were that the 1st defendant could get that quantity from elsewhere and supply it to the 3rd defendant. Had the price of sandalwood risen higher than that for which it was agreed to be sold, could it have been contended on the basis of a contract such as is to be found in Ex. J that the 3rd defendant would have been entitled to recover damages from the 1st defendant on the latter's failure to supply 57 tons of wood? We do not think so.

The next contention which appears to have been accepted by the lower Court and was advanced again before us was to the effect that the 1st defendant was not empowered by the power of attorney to enter into an agreement for the sale of forward goods or rather of wood which had not been cut, dried, cleaned and rendered fit for sale. Learned counsel for the respondents contends that the power of sale mentioned in the power of attorney after the power to have the sandalwood trees cut, leads to the inference that the power to sell could only be exercised after the trees had been cut. If the order in which the various powers have been conferred is read in the manner suggested by learned counsel for the appellant, it would mean that the power to pay wages, etc., to the coolies (apparently for cutting the trees) could not be exercised by the 1st defendant unless the sandalwood had been sold. But the sandalwood could not be sold, as contended, unless the trees were cut. And the trees could not be cut unless the coolies were paid either daily or weekly. The suggested construction would make it impossible for the 1st defendant to do any work and would defeat the very object for which the power of attorney was given to him. It is proved on the record that the usual procedure in this business is that the monies are advanced by the intending purchasers after they have entered into an agreement to buy the wood with the object of enabling the owner of the trees to pay for the cost of getting the trees cut and the wood dried and cleaned. The advances made by the persons who had entered into agreements of purchase are subsequently deducted from out of the price when the wood is delivered to them. This was exactly what had happened in this case as well. The power to sell the wood in the circumstances contained in the power of attorney would include the authority to agree to sell the wood that was not ready for delivery and had to be cut, dried and cleaned later on.

There is no force in the contention that the 1st defendant was not entitled to receive a large sum of Rs. 8,700 by way of an advance. There is nothing in the power of attorney which may even suggest that the 1st defendant's powers were in any way limited as long as he was exercising the authority given to him under Ex. M. But learned counsel for the respondents contended that the mere authority to sell the trees would not entitle

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the 1st defendant to receive their price, large or small. In support of this contention reliance was placed on an observation of a Division Bench of this Court in *Narasimhulu Chetti* v. *Sundarachariar*[1] which was to the effect that the authority to sell immovable property did not carry with it the authority to receive the price of the same. This was, however, in the nature of an *obiter* as the learned Judges were not satisfied in that case that Mr. Devarajulu Naidu had been authorised to sell the house at the price at which he had purported to sell it without any further reference to the owners. But there is no doubt that the learned Chief Justice was of that opinion and referred to two cases *Mynne* v. *Joliffe*[2] and *Viney* v. *Chaplin*,[3] on the authority of which he was prepared to hold that a mere general authority to sell land did not carry with it an implied authority to receive the purchase money on behalf of the principal. These decisions first of all would have no application to the present case as we are dealing with wood cut and dried and not with immovable property. But even with regard to immovable property it is not quite easy to lay down unconditionally, and we say so with very great respect to the learned Chief Justice, that a person authorised to sell the property would not ordinarily be entitled to receive the price for which he sells the property. It would be different if an agent is authorised to execute a conveyance merely. But when a person is authorised to sell, he is naturally authorised to do something more than to execute conveyances. For instance he can settle the price if he is not already asked to sell for a price fixed by the owner. He can select the purchaser and, in the absence of any specific directions, sell the property to any one that he likes if the same price is offered by more than one. He can enter into an agreement to sell or of sale and can convey the property. An agent having an authority to sell must not only be taken to have authority to do every lawful thing which is necessary to effect a sale but also what is usually done in the course of conducting a sale. And the receipt of the value or the price of the property sold by the agent must be regarded to be what is usually done in the course of conducting a sale. The power to receive the price must be ordinarily, and in the absence of any stipulation or direction to the contrary, considered to be implicit in the power of sale. It would otherwise mean that an agent who is authorised to sell the property to a vendee may sell and convey the property but when it comes to actually receiving the price for which it has been sold, he must withhold his hand and refer the vendee to go and pay it to the owner for the simple reason that there is no specific authority in his favour to receive it on behalf of the owner. What would happen if the vendee becomes an insolvent after the property has been conveyed to him? Is the owner to lose his money? Let us now examine the decision on which the observation of the learned Chief Justice was based.

1. (1910) 20 M.L.J. 479.
2. (1834) 42 Rev. Rep. 802.
3. (1858) 27 L.J. Ch. 434.

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The facts in *Mynne* v. *Joliffe*[1] were that an agent was employed to find a purchaser and to enter into a contract to sell an estate. He possessed no authority express or implied to receive the purchase money and was therefore held not entitled to receive the purchase money on behalf of the owner of the estate. It must not be overlooked that the agent in that case was merely a commission agent. This decision can only be understood on the basis that the agent in that case was an agent to find a purchaser and to enter into a contract to sell the estate but had no power to convey the same. Since the agent did not have the power to pass the title in the property, he was found to possess no authority to receive its price. This decision is no authority for the proposition that an agent who is authorised to sell the property and to convey the same to the purchaser, would not be entitled to receive the price of the property sold and conveyed by him. The case in *Viney* v. *Chaplin*[2] from which the observations of Lord Chancellor Cranworth were cited by the learned Chief Justice should present no difficulty if it is remembered that the vendor's solicitor, although he happened to be in possession of the executed conveyance along "with the signed receipt for the consideration money indorsed" was held not entitled to receive the purchase money for the property as he was found to possess no authority to receive the price and the possession of the conveyance and the receipt executed by the vendor were not found by the Court of Appeal to confer any authority on him to receive the money. There is nothing in that case to suggest that the solicitor was authorised to sell and convey the property himself. We have discussed these cases not because the decision in *Narasimhulu Chetti* v. *Sundarachariar*[3] is binding upon us (the observation being in the nature of an *obiter*) but out of respect for the learned Chief Justice. Sale has been defined in the Transfer of Property Act as being a transfer of ownership in exchange for a price. The authority to sell would therefore carry with it the power to receive the price. At all events, cases of movable property must be decided on entirely different considerations. An auctioneer who is merely an agent on behalf of an owner of goods was found entitled in *Woolf* v. *Horne*[4] to recover the price from the purchaser himself and was held personally liable when he failed to deliver the goods sold by him to the purchaser. It may be that this decision was arrived at as the auctioneer was held to be in possession of the goods (coupled with interest) as distinct from having merely their custody as a servant or an agent; but we have referred to this case to bring out the distinction between the sale of movable and immovable property. Section 27 of the Indian Sale of Goods Act (1930) and section 178 of the Indian Contract Act confer special powers on mercantile agents in regard to sales and pledges of goods. But it is worthy of note that section 27 of the Sale of Goods Act only provides that a person cannot validly sell the goods belonging to

1. 42 Rev. Rep. 802.
2. (1858) 27 L.J. Ch. 434.
3. (1910) 20 M.L.J. 479.
4. (1877) 36 L.T. 705.

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another unless he had authority to do so (or where the authority could not be disputed by the owner on account of his conduct) and does not separate the power of sale from the power or authority to receive the price. The authority to sell goods is assumed to carry with it the authority to receive the price.

We then come to the contention advanced by Mr. Sitarama Rao, learned counsel for the respondents, that the 1st defendant could not enter into a transaction in which his personal interest was in conflict with his duty towards the 2nd defendant, his principal and the transaction contained in Ex. J could not therefore be binding on him. This contention is based on the fact that the sum of Rs. 3,700 (which formed part of the advance stated to have been made by the 3rd defendant at the time when the agreement Ex. J. was entered into) had been due to the plaintiff by the 1st defendant in respect of certain prior transactions and it was not possible for the latter, as an agent of the 2nd defendant, to have accepted the money which he owed to the plaintiff by way of an advance towards the transaction in suit, without actually receiving it from the 3rd defendant unless the 1st defendant was not only in a position to pay the amount due by him to the plaintiff in cash in the 2nd defendant's account but had in fact done so. In order to substantiate the contention that the 1st defendant was induced to act in contravention of his duties towards his principal both by the 3rd defendant and by the plaintiff, reference was made to the letters Ex. F-11 and Ex. F-13 exchanged between the plaintiff and the 3rd defendant and it was urged that if the principle that no agent could be permitted to enter into a transaction in which he had a personal interest in conflict with his duty was to be upheld, the agreement Ex. J must be held to be void as against the 2nd defendant.

Reliance was placed by Mr. Sitarama Rao in this connection on two decisions by the House of Lords in *Reckitt* v. *Barnett Pembroke and Slater, Ltd.*[1] and *Midland Bank, Ltd.* v. *Reckitt and others.*[2] It was held in the first of these decisions that as the agent had not been authorised under the power of attorney given to him to use his principal's money for the purpose of paying his (the agent's) private debts and as the authority was limited to draw cheques in connection with the management of the principal's affairs, an issue of a cheque by the agent for the payment of his private debts could not fall within the authority. And as the bankers had notice that the principal's money was being applied for the agent's private purposes, they were held not entitled to keep the proceeds of the cheques. Similarly in the second case a solicitor who was authorised by a power of attorney to draw cheques on the client's banking account with the object of applying it for the purposes of his client was held to have no authority to draw cheques for the payment of his private debts to the Midland Bank. The Bank was found to have notice from the form of cheques issued that the money did not belong to the solicitor and was not consequently allowed to retain it as against

1. (1929) A.C. 176.
2. (1933) A.C. 1.

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the debts due to it by the solicitor on a suit for refund brought by his principal.

The only conclusion that could be drawn from these decisions is that the 1st defendant could not exceed his authority given under the power of attorney Ex. M and acknowledge the receipt of money due by him on behalf of his principal without an actual payment made by him in his principal's account. Nor could the 2nd defendant be liable to refund the amount that was not paid to the 1st defendant on his behalf unless he (the 2nd defendant) had chosen to ratify the 1st defendant's act with a full knowledge of all the facts so that the 2nd defendant may be found to have accepted the responsibility for his agent's act.

These decisions, or the principles, underlying these decisions, whatever their effect may be in regard to the sum of Rs. 3,700 and to a sum of Rs. 400 (out of Rs. 5,000) which was not admitted to have been received in cash, can have no effect on the sum of Rs. 4,600 which was actually paid to the 1st defendant within the authority conferred on him by the power of attorney Ex. M. Moreover, it must be remembered that the plaintiff is not suing for the performance of the contract contained in Ex. J. but merely for the refund of money paid by his agent, the 3rd defendant, to the 1st defendant. The plaintiff asks for the refund as the 3rd defendant was not, according to his contention, authorised to enter into this transaction without his specific authority and even if found to have been acting within the scope of his authority as the contract remained unfulfilled. The question of the authority of the 3rd defendant to enter into a contract of this kind may and would in fact bear on the question of the plaintiff's liability to pay damages for the breach of the contract but has, in our opinion, no relevancy to the question of refund for which this suit has been instituted. Had the 2nd defendant or the 1st defendant suffered no damages whatever in respect of the breach of the contract entered into by the 3rd defendant within the scope of his authority would it have been possible for the 1st defendant or even for the 2nd defendant, if the contract by the 1st defendant were found to be within the scope of his authority as this one is already held to be, to urge that the suit should be dismissed even to the extent of Rs. 4,600 simply because in taking the advance on behalf of the 2nd defendant the 1st defendant had agreed to accept the sum of Rs. 3,700 due by him to the plaintiff? To the extent of Rs. 4,600 at least there was no conflict between the 1st defendant's interest and duty. It is not possible therefore for the 2nd defendant to get rid of his liability to refund what had been actually received by his agent, the 1st defendant subject of course to the deduction of any damages that the plaintiff may be found liable to pay on account of the breach of the contract committed by the 3rd defendant and subject to our finding on the question of ratification by the 2nd defendant of the contract Ex. J. and thus of the advance of the entire sum of Rs. 8,700 pleaded by the plaintiff.

There is no evidence on the record that the 2nd defendant had ever ratified his agent's act in acknowledging the sum of

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Rs. 3,700 as an advance after the former had come to know that this sum of money was due by the latter and was not actually paid by the 3rd defendant. In the absence of any such evidence, it is not possible to make the 2nd defendant liable for payment of that sum or of any other sum that is not found to have been paid to the 1st defendant at the time when the agreement Ex. J was entered into.

After considering the evidence both documentary and oral in the case, the lower Court took the view that the contract Ex. J. entered into by the 3rd defendant must be taken to have been entered into within the scope of his authority and the plaintiff was therefore liable to pay damages to the 1st defendant for the breach of contract committed by him with the consent and at the instance of the plaintiff. Having been taken through the various documents and the oral evidence on the record we are of the same opinion and would therefore hold that the plaintiff is liable for the breach of contract.

Although there is a reference in the notice Ex. K that a sum of Rs. 5,000 was paid by the 3rd defendant to the 1st defendant, yet we find for a fact that Rs. 4,600 were paid in cash to the 1st defendant and that the 3rd defendant had executed a promissory note for Rs. 400 in favour of the 1st defendant on that date. This promissory note has not been paid for and was in fact produced in this Court by the 1st defendant as Ex. II. This shows that the second defendant could not be held liable to pay the sum of Rs. 400 which was not received by the 1st defendant.

Now that the contract Ex. J has been held to have been entered into by the 3rd defendant within the scope of the authority given by the plaintiff, the last question to decide is what damages is he (the plaintiff) liable to pay on account of the breach of contract committed by him or at his instance (*see* Ex. F-15 and Ex. H). An attempt was made by Mr. Sitarama Rao to show that his client would be entitled to recover damages at the rate of Rs. 50 per ton for the 87 tons that had been agreed to be supplied under the terms of Ex. J. We have already held that the contract was for the supply of 30 tons of sandalwood definitely and for such other wood that may be got out of the two estates and that it was not for 87 tons. The lower Court was, in the circumstances, of opinion that the damages claimed by the 1st defendant in his written statement amounting to Rs. 1,715-8-0 were not unreasonable and have been established. Having regard to the market conditions and to the rate prevailing for these goods at or about the time when they would have been delivered by the 1st defendant if the contract had not been cancelled in November, 1936, we are of opinion that the damages awarded by the lower Court were fully justified and we need not reduce them by Rs. 215-8-0 if we cannot see our way to enhance them in the manner asked for by learned counsel for the respondents.

For the above reasons the plaintiff is entitled to recover the sum of Rs. 4,600 from the 2nd defendant after being debited with the sum of Rs. 1,715-8-0, the amount of damages which he has been found liable to pay for the breach. The plaintiff would be entitled to recover this sum from the 2nd defendant. A decree

for the balance is accordingly passed in his favour against the 2nd defendant with interest at 6 per cent. from the date of the suit up to the date of realisation. The 1st defendant was liable to pay Rs. 3,700 to the plaintiff and a decree to that extent against him is maintained. The sum of Rs. 400 is found not to have been paid by the 3rd defendant to the 1st defendant. The promissory note executed by the 3rd defendant is, as stated before, on the record. No decree can be passed in regard to that sum. It will be delivered to the 3rd defendant as cancelled and he would no longer be liable to pay the amount due thereunder. As for costs the most appropriate order in the circumstances of the case seems to be that as between the plaintiff and the 2nd defendant, the parties will bear their own costs both here and in the Court below. But the 1st defendant will be liable to pay proportionate costs to the extent of the sum decreed against him in both the Courts.

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B.V.V. —— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

The Dutts' Trust, Calicut .. *Respondents.*

Commissioner of Income-tax, Madras v. Dutts' Trust, Calicut.

Income-Tax Act (XI of 1922), section 41 (1)—Trust for benefit of creditors running debtors' business—Income—Proper mode of assessment—Section 10 (2) (vi)—Depreciation—Not allowable in respect of business which had ceased to exist before year of account.

The partners of a firm conveyed their properties to trustees for the benefit of their creditors. The trustees sold in the firm's financial year a cinema business and a general business of the debtors but carried on a Saw Mill business which proved to be a profitable concern. The profits made from the Saw Mill were sufficient to pay in full all the creditors.

Held, (i) The income received by the trustees was received on behalf of the general body of creditors and not of the partners and income-tax should accordingly be levied on the trustees as trustees for the general body of creditors only.

(ii) The assessees have no right to deduct an allowance for depreciation in the general and cinema businesses discontinued prior to the year of account as a set off against the income of the Saw Mill business.

Reference under section 66 (2) of the Indian Income-tax Act, XI of 1922, (as it stood before Part II of the Act of 1942 came into force) by the Commissioner of Income-tax, Madras, for a decision of this Court on the following questions, *viz.,*

Q.—(1) "Whether under the provisions of the Act the assessment made on the trustees on behalf of the unregistered firm of Messrs. U. B. Dutt and Company, is correct in law?"

Q.—(2) "Whether under the provisions of the Act the unabsorbed depreciation of the general and cinema business discontinued prior to the year of account under review can be set off against the income of the Saw Mill business of the year of account which is the subject-matter of assessment?"

K. V. Sesha Aiyangar for Petitioner.

M. Subbaraya Aiyar for Respondents.

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*O.P. No. 17 of 1942. 20th July, 1942.

Commissioner of Income-tax, Madras v. Dutts' Trust, Calicut.

Leach, C.J.

The Judgment of the Court was delivered by

The Chief Justice.—The firm of U. B. Dutt and Company in which there were three partners, carried on business as general merchants in Calicut. They also owned a cinema and a Saw Mill at Kallai and a rice mill at Ernakulam. In 1935, certain creditors applied for the adjudication of the partners as insolvents under the Provincial Insolvency Act. This petition was not proceeded with, because on the 14th December, 1935, an agreement was arrived at under which the debtors' properties were to be conveyed to trustees for the benefit of their creditors. Accordingly the debtors' assets were conveyed to three trustees with power to realise what was necessary and to pay the creditors proportionately out of the monies they received. The trustees sold the cinema in the firm's financial year which ended on the 30th June, 1937. The general business was also sold, but they carried on the Saw Mill business which proved to be a profitable concern. The profits made from the Saw Mill were sufficient to pay in full all the creditors.

This case deals with the assessment of the trustees for the year 1939-40. The trustees claimed that the creditors were the beneficiaries of the trust, but the Income-tax authorities held that the partners were. The trustees also claimed to be entitled under the provisions of section 10 (2) (*vi*), to an allowance for depreciation of the assets which had been sold in the previous year, but this claim was also disallowed. In these circumstances the Commissioner of Income-tax has referred to this Court for decision the following questions:

Q.—(1) "Whether under the provisions of the Act the assessment made on the trustees on behalf of the unregistered firm of Messrs. U. B. Dutt and Company is correct in law?"

Q.—(2) "Whether under the provision of the Act the unabsorbed depreciation of the general and cinema business discontinued prior to the year of account under review can be set-off against the income of the Saw Mill business of the year of account which is the subject-matter of assessment?"

Section 41 (1) of the Act states that in the case of income, profits or gains chargeable under the Act which trustees appointed under a trust declared by a duly executed instrument in writing are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from the trustees in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf the income, profits or gains are receivable and all the provisions of the Act shall apply accordingly. There are two provisos to this sub-section, but it is only necessary to refer to the first one which says that where the income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate.

The deed of trust executed by the partners in U.B. Dutt and Company, was executed for the benefit of their creditors. The object of conveying their assets to the three trustees was

solely to provide for the liquidation of their debts. The profits received by the trustees were to be distributed among the creditors and this is what has been done. The contention that the beneficiaries here were the debtors is one which has only to be stated to be rejected. The income was received by the trustees on behalf of the general body of creditors. The answer to the first question is in the negative which means that the tax should be levied on the trustees as trustees for the general body of creditors.

Commissioner of Income-tax, Madras *v.* Dutts' Trust Calicut.

Leach, C.J.

The answer to the second question must be in favour of the income-tax authorities. Section 10 (2) (*vi*) cannot be read as giving the assessees the right to deduct an allowance for depreciation in a business which has ceased to exist. If the trustees had continued the cinema business, they would certainly have been entitled to an allowance; but, that business having ceased and the assets disposed of before the year of account, obviously they cannot ask for any allowance. Therefore the answer to the second question is also in the negative.

As the assessees have succeeded in part and failed in part, we will make no order as to costs.

K.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

In the matter of the Indian Income-tax Act, XI of 1922, and

In the matter of 66-R. A-1 (Madras) of 1941-42 on the file of the Income-tax Appellate Tribunal, Calcutta Bench.

Messrs. S. Subbiah Pillai and Sons, Ramnad District. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Messrs. Subbiah Pillai and Sons *v.* Commissioner of Income-tax, Madras.

Income-Tax Act (XI of 1922), *section* 33 *as now amended—Limitation of sixty days for preferring appeal to Appellate Tribunal—Computation—Deposit of Rs.* 100 *by assessee for making reference under section* 66 (1) *of the Act—If refundable.*

An assessee desired to appeal to the Income-tax Appellate Tribunal against an order of the Appellate Assistant Commissioner, dated the 24th November, 1940. The Income-tax Appellate Tribunal was constituted as from the 25th January, 1941 by notification published in the Gazette of India of that date. Section 33 of the Income-Tax Act as now amended requires that an appeal to the Appellate Tribunal shall be presented within sixty days from the date on which the appellant was served with the notice of the order. Rules regulating procedure had not been framed and were not in fact notified until the 1st February, 1941. Rule 14 of the rules provides that an appeal to the Tribunal shall be presented in person or by a representative to the Registrar at New Delhi or some other officer authorised in this behalf by the Registrar and a proviso follows to the effect that an appeal which is received in the office of the Registrar by post within the prescribed period of limitation shall be deemed to have been validly presented. Forms indicating the location of the office of the Tribunal were published on the 25th January, 1941, in New Delhi and therefore were not available to the appellant who was in a village in the Ramnad District. Having no in-

*O.P. No. 256 of 1941. 20th July, 1942.

Messrs. Subbiah Pillai and Sons *v.* Commissioner of Income-tax, Madras.

formation with regard to the procedure the assessee drafted a petition of appeal and posted it to the office of the Commissioner of Income-tax, Madras, with the request that it should be forwarded to the Tribunal. The petition was received by the Commissioner of Income-tax, Madras, on the 31st January, 1941 and posted by him to the Tribunal three days later, which was still in time. The period of sixty days expired on the 2nd February. That day being a Sunday the period was extended to 3rd February. The petition was received in the office of the Tribunal only on the 10th February. The Tribunal held that the petition was barred by limitation. On the reference *Held*: (*i*) The appeal was filed within the period of limitation in the only office which was then open to the assessee and in the circumstances the appeal should have been heard on its merits. (*ii*) There is nothing in the Income-Tax Act which would entitle the assessee to a refund of the deposit of Rs. 100 if the plea of limitation raised by the Income-tax authorities were sound.

Statement of the case by the Income-tax Appellate Tribunal, Calcutta under section 66 (1) of the Indian Income-tax Act, XI of 1922, referring to this Court the following questions, *viz.*,

Q.—(1) "Whether the appeal is liable to be rejected as barred by limitation in the circumstances of this case?"

Q.—(2) "Whether the assessee is entitled to a refund of the deposit of Rs. 100 when the appeal is rejected not on the merits but on the ground of limitation?"

K. R. Srinivasaraghavan for Applicant.

K. V. Sesha Aiyangar for Respondent.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The Income-tax Appellate Tribunal, Calcutta, has referred to this Court under section 66 (1) of the Income-tax Act the following questions:—

Q.—(1) "Whether the appeal is liable to be rejected as barred by limitation in the circumstances of this case?"

Q.—(2) "Whether the assessee is entitled to a refund of the deposit of Rs. 100, when the appeal is rejected not on the merits but on the ground of limitation?"

The reference discloses a surprising situation, but fortunately it is not likely to arise again. The assessee desired to appeal to the Tribunal against an order of the Appellate Assistant Commissioner, dated the 24th November, 1940. The Income-tax Appellate Tribunal was constituted as from the 25th January, 1941, by notification published in the Gazette of India of that date. Section 33 of the Act, as now amended requires that an appeal to the Appellate Tribunal shall be presented within sixty days from the date on which the appellant was served with the notice of the order. No rules had been framed regulating the procedure to be followed and were not in fact notified until the 1st February, 1941. The assessee lives in a village in the Ramnad District and any notification published in the Gazette of India could not reach him for a week after the publication because of the great distance between Delhi and the place where the assessee is carrying on business. Rule 14 provides that an appeal to the Tribunal shall be presented in person or by a representative to the Registrar at New Delhi or some other officer authorised in this behalf by the Registrar. A proviso follows to the effect that an appeal which is received in the office of the Registrar by post within the prescribed period of limitation shall be deemed to have been validly presented. According to the order of the Appellate Tribunal which has given rise

to this reference, forms indicating the location of the office of the Tribunal were published on the 25th January, 1941, but they were also published in New Delhi and therefore were not available here when the appellant filed his appeal.

Having no information with regard to the procedure, which he was to follow, he did what a sensible man would do in the circumstances. He drafted his petition of appeal and posted it to the Office of the Commissioner of Income-tax, Madras, with the request that it should be forwarded to the Tribunal. Before the Act was amended any order passed by the Appellate Assistant Commissioner could only be challenged before the Commissioner and obviously he was the proper person to address. The petition of appeal was received by the Commissioner of Income-tax, Madras, on the 31st January, 1941 and posted by the Commissioner to the Appellate Tribunal three days later, which was still in time. The period of sixty days expired on the 2nd of February, but this was a Sunday and therefore the period was extended to the 3rd February. The petition was received in the Office of the Tribunal on the 10th February, which in itself gives an indication of the time taken in the post.

Surprising though it be in the circumstances, the Income-tax authorities opposed the consideration of the appeal on its merits, on the ground that it had been filed out of time and they succeeded in persuading the Tribunal to accept this contention. The Tribunal expressed the opinion that the assessee had constituted the Commissioner his agent for presenting the appeal to the Tribunal. We cannot accept this statement as correctly representing the position. The appellant sent his petition of appeal to the only Income-tax Office open to him so far as was known in this Presidency.

In its order the Tribunal goes on to say:

"It is unfortunate that the appellant did not know with whom the appeal had to be filed, but this cannot be said to have the effect of enlarging the provisions of the section by reading into it more than has been provided."

It is not a question of the enlargement of the period of limitation. The appeal was filed within the sixty days in the only office which was then open to the appellant, and the appeal should have been heard on its merits. To hold that the appellant is not entitled to have his appeal heard in these circumstances would mean a gross injustice. The first question will be answered in the negative.

In view of our answer to the first question the assessee's appeal will now be heard. Therefore, the second question does not really arise. We may add, however, that there is nothing, as far as we can see, in the Act, which would entitle him to the refund of the deposit if the plea of limitation raised by the Income-tax authorities were sound. The second question will be answered in that sense.

As the appellant has succeeded on the main issue, he will have his costs, Rs. 250.

K.S. — *Reference answered.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN, SIR CHARLES CLAUSON AND SIR MADHAVAN NAIR.

Raja Shiva Prasad Singh .. *Appellant**

v.

Tincouri Banerji and another .. *Respondents.*

P.C.

Raja Shiva Prasad Singh *v.* Tincouri Banerji.

Promissory note for amount undertaken to be paid by one party as part of a compromise to a creditor of the other party—Suit on—Plea that creditor cannot recover against original debtor—Not open.

The defendant against whom a decree was sought to be executed entered into a compromise by which he undertook *inter alia* to discharge debts due by his decree-holders to certain creditors of whom *K* was one. In pursuance of that undertaking the defendant executed a promissory note to *K*, who had been acting as adviser to the decree-holders and had taken part in the negotiations for the compromise. A suit by the representatives of *K* for the recovery of the balance due on the promissory note was resisted on the ground that *K* had intervened in the litigation between the defendant and the decree-holders for the purpose of making money for himself out of the litigation and was on that ground disentitled as against the defendant to derive any advantage to himself. It was also suggested that *K* had accepted a bribe from the defendant. The defendant did not seek to get out of the compromise itself. In the circumstances,

Held: The alleged impropriety of *K's* conduct in regard to the litigation is, as between the defendant and *K's* representatives, completely irrelevant. Nor can the defendant's case be bettered by the fact that he paid to *K* and *K* accepted from him a bribe to facilitate the negotiations. While that circumstance may well give the original decree-holders certain rights, it cannot possibly operate to relieve the defendant in any measure from the obligation he had undertaken to those decree-holders as well as to *K* to discharge the burden which he had taken on his own shoulders as part of the compromise.

Appeal from a decision of the High Court of Judicature at Patna.

C. S. Rewcastle and *U. Sen Gupta* for Appellant.

Sir Thomas Strangman and *C. Bagram* for Respondents.

Their Lordships' Judgment was delivered by

Sir Charles Clauson.

SIR CHARLES CLAUSON.—This is an appeal by the defendant in the suit against a decree of the High Court at Patna affirming (with a trifling amendment dealing with a matter of interest) a decree of the Subordinate Judge of Dhanbad, and ordering the defendant to pay to the plaintiffs (with certain interest) a sum of Rs. 2,83,550, representing the principal and interest remaining due on a promissory note of the 22nd February, 1934, after the defendant has been credited with certain sums paid on account of the note. The plaintiffs are the representatives of one Kedar, to whom the promissory note was given by the defendant.

The circumstances attending the giving of the note may be stated quite shortly. Kedar had been the secretary of the defendant's predecessor in the family Raj; and on that predecessor's death he became the secretary of the defendant; but shortly afterwards left his service and became adviser to the defendant's predecessor's widows, whom it will be convenient to refer to as the

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*P.C. App. No. 27 of 1940. 19th February, 1942.

P.C.

Raja Shiva Prasad Singh *v.* Tincouri Banerji

Sir Charles Clauson.

Ranees. The Ranees, possibly (as is suggested) under Kedar's advice, proceeded to litigate certain claims against the defendant, and in the result obtained a decree against the defendant to pay to them a sum slightly in excess of Rs. 20 lakhs. Upon the Ranees seeking execution of this decree, negotiations for a compromise ensued, in which Kedar acted as adviser to the Ranees. The negotiations resulted in a compromise, entered into in February, 1934, under which, in addition to certain sums which the defendant had already paid to the Ranees under the decree, he was to pay them a further sum, in full satisfaction, of Rs. 18 lakhs. Of this 18 lakhs, two lakhs were to be (and apparently in fact were) paid down in cash; the defendant was to pay to certain creditors of the Ranees, of whom Kedar was one, a sum of Rs. 4,40,000, which included a sum of Rs. 2,90,000 payable to Kedar; the balance of Rs. 11,60,000 was to be paid by the defendant to the Ranees by various instalments. It was arranged that the Ranee's creditors thus to be paid by the defendant should be given promissory notes by the defendant to the amount of their respective debts, and that the Ranees should thereupon be absolved by them from liability for those debts. Accordingly the promissory note, the subject-matter of the suit, was given by the defendant to Kedar. Kedar died shortly afterwards, and as the defendant, after he had made some payments on account, failed to pay any more, the plaintiffs as his representatives initiated the present suit for the balance unpaid.

It is said that in order to get the negotiations through, the defendant made Kedar a present of Rs. 60,000. For the present purpose it is obviously unnecessary to consider what rights would accrue to the Ranees by reason of the giving and receiving of this bribe. The defendant, perhaps not unnaturally, does not seek to get out of the compromise, and does not dispute that as between himself and the Ranees he is bound to carry it out. It was suggested in the Courts below, though (quite properly) counsel before this Board found himself unable to put forward the suggestion to their Lordships, that the defendant was entitled to establish, if he could, that the Ranees, if they had been sued by Kedar, could have resisted the payment to him of the whole or part of the Rs. 2,90,000, which, as part of the compromise, the defendant had bound himself to the Ranees to pay to Kedar. It is obvious that this was not a matter which could be raised by the defendant in answer to a demand by Kedar or his representatives for payment of a sum which as between himself and the Ranees he had agreed to pay to Kedar to their indemnity and both Courts have so held. A number of other pleas of an equally irrelevant character were urged by the defendant in the Courts below, and, quite correctly, rejected by both Courts. Their Lordships, however, do not propose to deal with them in detail, as in the argument before this Board counsel (in their Lordships' opinion quite properly) felt himself unable to rely upon any of them, and ultimately based the appeal on the suggestion that Kedar had intervened in the litigation between the defendant and the Ranees as adviser to the Ranees for the purpose of making money for himself out of the litigation, and

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was on that ground disentitled as against the defendant to derive any advantage for himself. Their Lordships were referred by counsel to the decision of this Board in *Chedambara Chetty* v. *Renga Krishna.*[1] In regard to that case their Lordships need do no more than express their agreement with the High Court that the facts bear no resemblance to those of the present case. Their Lordships certainly laid down no principle which could possibly avail the defendant in the present case. When it is once admitted, as the defendant in the present case has throughout admitted, that he does not seek to upset the compromise (as indeed he could not possibly do in the present suit, to which the Ranees are not parties), it must be taken as against him that the sum which he has by the compromise undertaken to pay, by virtue of the promissory note to Kedar, is, as he has agreed with the Ranees, a sum for which he is liable to Kedar, and the impropriety of Kedar's conduct in regard to the litigation becomes, as between the defendant and Kedar or his representatives, completely irrelevant. Nor can the defendant's case be bettered by the fact that he paid to Kedar and Kedar accepted a bribe to facilitate the negotiations. While that circumstance may well give the Ranees certain rights, it cannot possibly operate to relieve the defendant in any measure from the obligation he has undertaken to the Ranees as well as to Kedar to discharge the burden which he has taken upon his own shoulders as part of the compromise.

Their Lordships will accordingly humbly advise His Majesty to dismiss the appeal. The appellant will pay the respondents' costs of the appeal.

Solicitors for Appellant: *Douglas Grant & Dold.*

Solicitors for Respondents: *Hy. S. L. Polak & Co.*

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Sree Raja Kandimalla Venkata Rama Narasimha Rao Bahadur Zamindar .. *Petitioner** (*Plff.*)

v.

Sri Inuganti Sitha Ramachandra Rao and another. *Respondents* (*Defts.*).

Venkata Rama Narasimha Rao Bahadur *v.* Sitha Ramachandra Rao.

Court Fees Act (*VII of* 1870), *section* 7 *clause* (iv) *A*—(*Madras amendment*)—*Suit for declaration that a decree was not executable against the plaintiff by reason of an agreement to that effect entered into before the filing of the earlier suit—Proper frame of and Court-fee payable.*

In execution of a decree in a suit on a promissory note some of the properties of *X*, the payee who had endorsed the note in favour of the plaintiffs in that suit for consideration, were sold and he eventually brought a suit for a declaration that the decree was not executable against him and for consequential relief in the shape of setting aside the execution sales already held together with an injunction preventing further execution against him. The basis of the claim to avoid execution was an agreement between himself and the decree-holders prior to the institution of the suit on the note to the effect that no remedies should be claimed against him.

1. (1874) L.R. 1 I.A. 241.

*C.R.P. No. 2003 of 1941. 31st August, 1942.

Venkata Rama Narasimha Rao Bahadur *v.* Sitha Ramachandra Rao.

Held: The only way in which the decree can be attacked is by setting it aside and not by way of a declaration. The valuation of such a suit comes within the scope of section 7, clause (*iv*) A (Madras amendment) of the Court-Fees Act and the suit must accordingly be so valued for purposes of court-fee.

Papamma v. *Venkayya*, (1935) 69 M.L.J. 451: I.L.R. 58 Mad. 994 (F.B.), distinguished.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of West Godavari at Ellore, dated 18th August, 1941 and made in O.S. No. 5 of 1941.

V. S. Narasimhachar and *N. Appu Rao* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—The essential facts leading to this revision petition are that a suit on a promissory note was brought against the makers and also against the present petitioner, in whose favour the note had been executed and by whom it had been endorsed to the plaintiffs in that suit for consideration. A decree was obtained against the makers and also against the petitioner and his two sons. In execution of that decree some of the petitioner's property was sold and he eventually brought a suit in the District Judge's Court at West Godavari for a declaration that the decree was not executable against him and for consequential relief in the shape of setting aside the execution sales already held together with an injunction preventing further execution against him. The basis of this claim to avoid execution was an agreement which the petitioner alleged had been entered into between himself and the decree-holders prior to the institution of the suit on the note to the effect that no remedies should be claimed against him. Although the plaint was for a declaration with consequential relief which the petitioner valued at an arbitrary figure of his own, the learned District Judge found that in effect it was a suit to set aside the decree in so far as it bound him and must therefore be valued for purposes of court-fee accordingly. The petitioner was called upon to pay court-fee of Rs. 3,352-7-0 within a period of two weeks. This he failed to do but the consequential dismissal of the suit was avoided by an order staying further proceedings. It is against this order calling for additional court-fee that this revision petition has been brought.

The learned advocate for the petitioner relies on the case of *Papamma* v. *Venkayya*.[1] That was a case in which an agreement had been entered into subsequent to the institution of a suit but before obtaining the decree. This agreement that execution was not to proceed against one of the parties was set up in the course of execution proceedings. The subordinate Judge found in that case that the agreement was true and could be successfully pleaded in bar of execution. The matter was taken in appeal and the Full Bench held that such an agreement could be set up in execution. There is, however, an important distinction to be drawn between the facts of that case and the facts of the present case.

1. (1935) 69 M.L.J. 451: 58 Mad. 994 (F.B.).

Venkata Rama Narasimha Rao Bahadur *v.* Sitha Ramachandra Rao.

In the case reported the agreement relied upon was entered into after the institution of the suit but before the passing of the decree, but in the case now under consideration the agreement is alleged to have been entered into before the suit was ever filed. According to the facts set out in the plaint the endorsement of the promissory note by this petitioner in favour of the decree-holders was without any right of recourse and this plaint asserts that the petitioner and his two sons were added only nominally or formally, there being a prior agreement that the decree was not to be executed against them. If the petitioner's endorsement was without any right of recourse, it is difficult to see what relief could have been obtained against him. If there was no right of recourse and there was this prior agreement that execution should not be levied against him and his sons, it is unbelievable that the plaint in that suit would not have contained a statement that no relief was asked for against this petitioner and his sons. Moreover, it is to be expected that the petitioner and his sons would have raised the obvious plea that they were unnecessary parties to the suit and that no relief could be claimed against them because the endorsement had expressly been made without any right of recourse. However, these are questions of fact with which the Court is not at present concerned.

The definition of a decree in section 2 of the Civil Procedure Code is in the following words:

> " 'Decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

Since the absence of any right of recourse and the prior agreement that no relief should be claimed against the plaintiff are matters arising previous to the institution of the suit, and which should properly have been taken in defence to that suit, it cannot be claimed that the decree did not determine all the rights of the parties. What the petitioner is in effect now saying is that "there were defences open to me in that suit which I did not bother to raise because no relief was to be claimed against me. Because the decree has been passed against me I now seek to have the matter re-opened and these defences examined."

One of the main objections taken by the learned advocate for the petitioner is that he is not seeking to set aside the decree and that his plaint is outside the scope of the decision in *Ramaswami* v. *Rangachariar*.[1] But Mr. Kuttikrishna Menon, the learned Government Pleader, contends that unless the suit be brought to set aside the decree, no suit will lie at all for the reason that if the matter is one arising only in execution between the parties it comes within the scope of section 47 of the Civil Procedure Code and no separate suit will lie. Therefore, if the petitioner insists upon bringing a suit in order to establish the right he claims, he must bring it in a form which takes it outside the scope of section 47 of the Code and the only way in which he can do that is by claiming to set aside the decree.

1. (1940) 1 M.L.J. 32 : I.L.R. 1940 Mad. 259 (F.B.).

In the result, I find that the case of *Papamma* v. *Venkayya*,[1] relied on by the learned advocate for the petitioner does not apply to the facts of the present case and that the only way in which the decree can be attacked is by setting it aside and not by way of a declaration. The valuation of such a suit comes within the scope of section 7, clause (*iv*)-A (Madras amendment) of the Court-Fees Act and the order calling upon the petitioner to pay the deficit court-fee is correct.

Venkata Rama Narasimha Rao Bahadur *v.* Sitha Ramachandr Rao.

This petition is accordingly ordered to be dismissed with costs. The petitioner will be given 21 days from the date of this order in which to make the deficit payment.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN AND MR. JUSTICE SOMAYYA.

The Burmah-Shell Oil Storage and Distributing Company of India Limited, Madras .. *Appellant** (*1st Deft.*)

v.

The Official Receiver, Tinnevelly .. *Respondent* .. (*Plff.*).

Transfer of Property Act (IV of 1882), section 130, Proviso—Effect—Assignment of debt—Notice given by assignor and assignee—Debtor making payment to third party under orders of Court—Whether protected.

Burma-Shell Oil Storage and Distributing Co., Ltd., Madras *v.* Official Receiver, Tinnevelly.

The P.S. firm had a deposit with the *B* company. Subsequently the P.S. Firm assigned the deposit to the *R* firm and notices of assignment of the deposit were given to the *B* company both by the assignor and the assignee. After this assignment of the debt members of the *R* firm were adjudged insolvents. The creditors had in the meantime brought suits and in execution of the decrees passed they obtained attachment of the debt due by the *B* company to the *R* firm. The *B* company objected and also intimated to the receiver of the insolvents' estate and their advocate but no action was taken by them and the money was paid to the decree-holders in pursuance of orders of Court. Thereupon the Official Receiver instituted a suit for recovery of the whole amount deposited with the *B* company, who contended that they could not be made to pay the same debt twice over.

Held, that in view of the express notices given to the *B* company by the assignor and the assignee of the debt, the payment by the *B* company, even if it happened to be under the orders of the Court, could not be protected, and that the Receiver was entitled to recover the debt.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in O.S. No. 42 of 1938.

C. Krishnaswami Aiyar instructed by *King* and *Partridge* for Appellant.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Respondent.

The Judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.—Stripped of further details the only question to be decided in this case is whether a debtor, the debt due from whom has been assigned over to a third person, can, even after the notice of the assignment of the debt, pay a portion of that debt under the orders of Court in a case to which the assignee was not a party and in such a manner as to protect him

1. (1935) 69 M.L.J. 451: 58 Mad. 994 (F.B.).

*Appeal No. 297 of 1940. 1st September, 1942.

Burma-Shell Oil Storage and Distributing Co., Ltd., Madras *v.* Official Receiver, Tinnevelly.

Abdur Rahman, J.

from paying it over again to the assignee when called upon so to do.

The facts out of which the above question emerges are quite simple and may be briefly stated. The joint family firm, which may be described as a P. S. Firm, had a deposit with the Burma Shell Company. This P. S. Firm assigned the deposit to another firm, which may be described for the sake of facility as R. P. D. Firm. Notices of assignment of the deposit were given to the Burma Shell and Company (Exs. E and F) both by the assignor and the assignee. After this assignment of the debt, members of the R. P. D. Firm were adjudged insolvents. Two creditors had in the meantime brought suits in the District Munsiff's Court at Tinnevelly and Tenkasi. Decrees were passed in these suits and in execution, they obtained attachment of the debt due by the Burma Shell and Company to the R. P. D. Firm. The Burma Shell and Company objected and also wrote to the receiver and the insolvents' advocate informing them of these attachments. The receiver, however, took no action and the money attached with the Burma Shell and Company was ordered by both the Courts to be paid over to the decree-holders. One payment appears to have been made before the institution of the present suit and the other, a few months afterwards, although by then the fact of the institution of the suit (*i. e.*, the one out of which the present appeal arises), by the Official Receiver, for the recovery of the whole of the amount deposited with the Burma Shell and Company had been brought to their notice. The suit was decreed by the Subordinate Judge of Tinnevelly and the payments which were made by the Burma Shell and Company in obedience to the orders of the execution Courts were not taken into consideration. The Burma Shell and Company appeals in respect of those payments on the ground that they are being made to pay the same debt twice over.

In view of section 130 of the Transfer of Property Act, the validity of the assignment of the debt due by the Burma Shell and Company to the R. P. D. Firm, is not disputed, but it is contended that the notices served by the appellant on the insolvents' advocate and the Official Receiver (Exs. V, M and XIII) protect them from making the payment of a portion of the debt over again. Reliance is placed in support of this contention on an English case in *Wood* v. *Dunn*.[1] This case, however, has no application as the payment by the debtor had been, in that case, made before he had any notice of the assignment. Such a payment would be protected even under the Indian law under the proviso to section 130. Certain doubts were, however, expressed in that case to which learned counsel for the appellant drew our attention. But in view of the clear provisions of section 130 of the Transfer of Property Act, those doubts do not in any way affect the decision of this case. Under section 130 of the Transfer of Property Act, the transfer of an actionable claim when effected by the execution of an instrument in writing signed by the transferor, as in this case, becomes complete and effectual

1. L.R. (1866) 2 Q.B. Cases 73.

upon the execution of such an instrument and all the rights and remedies of the transferor come to vest in the transferee as soon as that is done, whether or not a notice of the transfer is given to the person from whom the money is due. But that section also provides for an exception. It is as follows:

Burma-Shell Oil Storage and Distributing Co., Ltd., Madras v. Official Receiver, Tinnevelly.

Abdur Rahman, J.

"Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer."

In view of this proviso every "dealing with the debt" (which we take it, would include the dealing with the debt under the order of the Court) would be valid as against such transfer except when the debtor was a party to the transfer or had received express notice of the assignment. We have already said so in the earlier portion of our judgment that notices of the assignment were given to the Burma Shell and Company both by the P. S. Firm, the assignors and R. P. D. Firm, the assignees (Exs. E and F) and in view of those express notices, the payment by the Burma Shell and Company, even if it happens to be under the orders of Court cannot be protected. The same view was taken by Shadi Lal, J., (as he then was) in *Hari Ram* v. *Hukam Chand*.[1]

For the above reason the appeal fails and is dismissed with costs.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

The India Sugars and Refineries, Ltd., a limited liability company having its registered office at Hospet, Bellary District .. *Appellant** (*Plff.*)

v.

The Municipal Council, Hospet .. *Respondent* (*Deft.*).

India Sugars and Refineries, Ltd. v. Municipal Council, Hospet.

Municipality—Levy of profession tax—Assessment, based on materials furnished by assessee—Modification on basis of subsequent events—Licence fee—Nature of levy—Enhancement of fee—Interference by Court—Suit for recovery—Profession tax wrongfully levied—Limitation Act (1908), *Art.* 62—*Applicability.*

Article 62 of the Limitation Act is intended to apply to all actions for money had and received to the use of the plaintiff whether they be actions which may be deemed strictly to be based on implied contracts or whether they be merely to enforce an equitable claim to the return of the money had and received. A suit for recovery of the profession tax alleged to have been wrongfully levied by a Municipal Council is governed by Art. 62. *Municipal Council, Dindigul* v. *The Bombay Company, Limited,* (1928) 56 M.L.J. 525: I.L.R. 52 M. 207 and *Taluk Board of Devakottah* v. *Chockalingam Chettiar,* 1932 M.W.N. 1089; referred to.

Where the Municipal assessment of a company to profession tax was based on the profit and loss statement of the company then furnished but it appeared that at a subsequent date the company was permitted by the Income-tax Department to write off the entire profits towards depreciation of machinery,

1. (1915) 28 I.C. 317.

*Appeal No. 206 of 1940. 10th August, 1942.

India Sugars and Refineries, Ltd. v. Municipal Council, Hospet.

Held, that the assessment made on the materials then furnished by the assessee could not be said to be irregular and the levy of the tax on that basis was not unlawful.

A licence fee for carrying on a particular trade or industry should not be regarded as a form of taxation the extent of which is to be governed purely by revenue considerations. The licence fee should bear as nearly as possible a relation to the cost of issuing the licence and the cost of supervising the trade or of any special measures rendered necessary by the character of that trade. It is doubtful whether a Municipality would be justified in increasing the licence-fee chargeable upon a particular industry merely by reason of the cost of ordinary municipal services to which that industry is entitled by virtue of its position as a tax-payer in the Municipality. But if the industry involves special sanitary precautions, a special supervising agency or such like expenditure, such expenditure may be taken into account in fixing the amount of the fee. When a supervising agency is necessary for a number of industries it will be difficult to say how the cost is to be apportioned, and so long as the apportionment is made on a reasonable basis, it is not for the Courts to interfere with the way in which it has been achieved.

Appeal against the decree of the District Court of Bellary, dated 21st September, 1939 and passed in O.S. No. 1 of 1938.

T. M. Krishnaswami Aiyar instructed by *Messrs. Short Bewes and Company* for Appellant.

P. Chandra Reddi for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The appellant was the plaintiff in a suit to recover licence-fees and profession tax alleged to have been wrongfully levied by the defendant, the Municipal Council, Hospet, during the period from October, 1933 to September, 1937. The plaintiff company started to build a sugar factory in Hospet in October, 1933. Profession tax was levied on the Company from the half year ending 31st March, 1934, onwards. It seems to be clear that the plaintiff company did not actually start manufacture until the beginning of 1935 and with reference to the first year's profession tax the question is really one of limitation. The learned District Judge has found on the authority of the decisions in the *Municipal Council, Dindigul* v. *The Bombay Company, Limited*[1] and *The Rajputana Malwa Railway Co-operative Stores, Ltd.* v. *The Ajmere Municipal Board*,[2] that Article 62 of the Limitation Act applies and that the suit with reference to the first year's assessment is barred by limitation. An attempt has been made to argue that Article 62 applies only to an action for money had and received in the strictest sense of the term as understood in the Courts of Common Law in England and that when the action is based not on any implied contract, but on the principle of *ex aequo et bono* Article 62 would have no application and the residuary Article 120 would apply. We have been referred to no authority in support of this argument and it seems to us that Article 62 is intended to apply to all actions for money had and received to the use of the plaintiff whether they be actions which may be deemed strictly to be based on implied contracts or whether they be merely to enforce an equitable claim to the return of the money had and received. We therefore agree with the learn-

1. (1928) 56 M.L.J. 525: I.L.R. 52 Mad. 207.
2. (1910) I.L.R. 32 All. 491.

India Sugars and Refineries, Ltd. *v.* Municipal Council, Hospet.

Wadsworth, J.

ed District Judge that the claim in so far as it relates to the first year's profession tax is barred by limitation. We may add that a similar view has been taken in *Taluk Board of Devakottah* v. *Chockalingam Chettiar*,[1] following the reasoning in *Municipal Council, Dindigul* v. *The Bombay Company, Limited, Madras.*[2]

With reference to the claim for profession tax of the later years we have not been referred to any materials for holding that the recovery of the tax was unlawful or that the procedure in assessment was contrary to law. An attempt has been made to show that the estimate of the plaintiff's income was wrong, in fact in that it differed from an income-tax assessment made subsequent to the date of the Municipal assessment and apparently on the basis of different accounts. The profit and loss statement for eighteen months which was the main material available to the Municipality discloses a profit which formed the basis of the estimate of the plaintiff's income. It would appear that at some subsequent date the plaintiff was permitted by the Income-tax Department to write off his accounts the whole of this profit by making a substantial allowance for depreciation of machinery which was not made at the time when the profit and loss statement was originally prepared. Perhaps if the plaintiff had furnished proper accounts and full materials to the Municipality the tax which has been imposed upon the company would not have been recovered. But it does appear that the plaintiff company is itself to blame for not having furnished proper materials to the Municipality and there is nothing to show that the procedure of the Municipality was irregular or that the taxation of the plaintiff was inspired by any improper motive. We therefore find that the plaintiff is not entitled to recover any of the profession tax levied from it.

The question of the licence-fees is somewhat different. The plaintiff's factory was engaged in what is admittedly an offensive trade which requires to be controlled by the Municipal authorities, lest it should be a nuisance to the public. For that reason it has to be licensed and it has to be inspected. The fee charged for the licence was Rs. 100 up to 1936 at which time it was represented to the Municipal Council that the existing scale of fees was too low and that the distribution of the cost of supervision, etc., among the various factories was inequitable and consequently the Municipal Council resolved to raise the fee to one based on the horse-power of the engine of the factory concerned at a rate of Re. 1 per horse-power. The result of this new scale was that the plaintiff's licence-fee suddenly went up from Rs. 100 to Rs. 1,050. There is no suggestion that the raising of the fee was beyond the powers of the Municipality provided that the considerations which led the Municipality to raise the fee were proper. Nor is there any evidence that the fee was raised arbitrarily with a view to damage any particular individual. The truth seems to have been that the existence of this factory in an area which had hitherto been unoccupied owing to its malarious

1. 1932 M.W.N. 1089.
2. (1928) 56 M.L.J. 525: I.L.R. 52 Mad. 207.

India Sugars and Refineries, Ltd. v. Municipal Council, Hospet.

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character did involve the Municipality in considerable extra expense, owing to the large number of employees squatting in the neighbourhood of the mill. It was also found that the mill caused very heavy traffic on the roads much of which was unremunerative to the Municipality because the carts came from outside the town. The supervision of this factory so far as its internal sanitation was concerned involved regular visits from the Commissioner, Health Officer and Sanitary Inspector. It is, we think, well settled that a licence-fee for carrying on a particular trade or industry should not be regarded as a form of taxation the extent of which is to be governed purely by revenue considerations. The licence-fee should bear as nearly as possible a relation to the cost of issuing the licence and the cost of supervising the trade or of any special measures rendered necessary by the character of that trade. We doubt whether the Municipality could be justified in increasing the licence-fee chargeable upon a particular industry merely by reason of the cost of ordinary municipal services to which that industry is entitled by virtue of its position as a tax-payer in the Municipality. But if the industry involves special sanitary precautions, a special supervising agency or such like expenditure, it is, we think, reasonable to take this expenditure into account in fixing the amount of the fee. When a supervising agency is necessary for a number of industries it will always be difficult to say how the cost is to be apportioned and so long as the apportionment is made on a reasonable basis, it is not for the Courts to interfere with the way in which it has been achieved. There are no materials before us to justify a conclusion that the raising of the licence-fees charged on the plaintiff's factory was arbitrary or that the Municipality did not fix those fees in an endeavour to distribute as equitably as possible the special cost of the supervision of the various factories according to their sizes. It may well be that an error of judgment might have been committed in estimating the amount of extra expense involved by the supervision of these offensive trades, but even so the matter is one within the competence of the Municipal Council which is of course always subject to the control of the Government. The Courts certainly should not declare a fee or a levy to be *ultra vires* merely because it is somewhat higher than might have been thought necessary on a different view of the facts. We are of opinion that it has not been established that the levy of the licence-fee in this case bears no relation to the costs and expenses entailed in the supervision of the trade and of its sanitation. In this view we dismiss the appeal with costs.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KUPPUSWAMI AYYAR.

Examiner of Local Fund Accounts, Madras .. *Appellant** (*1st Respt.*)

v.

C. Subramania Mudaliar and others .. *Respondents* (*Petrs. and Respts.*).

Examiner of Local Fund Accounts, Madras v. Subramania Mudaliar.

Madras District Municipalities Act (V of 1920), Sch. IV, rule 62—Right of appeal against order of District Judge—If retrospective.

The right of appeal created by a new rule (rule 62 of Sch. IV of Madras Act V of 1920 against an order of the District Court to set aside a surcharge order) will not affect orders passed on petitions instituted before the rule came into force (July, 1939) though the orders on such petitions were passed later.

There is no logical distinction between a right of appeal and the right to a final judgment without an appeal. Both are vested rights and cannot be deemed to be affected by later enactments or rules retrospectively unless such an enactment or rule is given retrospective operation either expressly or by necessary intendment.

Vasudeva Samiar, In re, (1928) 56 M.L.J. 369: I.L.R. 52 Mad. 361 (F.B.), applied.

Appeals against the orders of the District Court of Chingleput, dated 2nd May, 1940 and made in O.P. Nos. 2 and 3 of 1938 respectively.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

S. Panchapagesa Sastri for Respondents.

The Court delivered the following

JUDGMENT.—There is a preliminary objection to the maintainability of these appeals, based upon the fact that when the applications were filed in 1938 no right of appeal existed. This objection is supported by the Full Bench Judgment in *Vasudeva Samiar*, In re.[1] That was no doubt a case in which during the pendency of certain proceedings a right of appeal was taken away; but in our opinion there is no logical distinction between a right of appeal and a right to a final judgment without an appeal. Both are equally vested rights. We hold accordingly that the principles of *Vasudeva Samiar*, In re,[1] applies to this case, and we see nothing in the rule establishing the right of appeal that "expressly or by necessary intendment" gives it retrospective effect.

We do not think the rulings cited by the learned Government Pleader are of any assistance to him. In *Guruswami Pillai* v. *Veerabhadra*[2] great stress is laid by the learned Judges on the fact that the change there dealt with is a change only in procedure which does not take away a right of appeal. *K. C. Mukerjee* v. *Musammat Ram Ratan Kuer*[3] and *Municipal Council of Sydney* v. *Troy*[4] are decisions which depend upon the interpretation of

*A.A.O. Nos. 127 and 128 of 1941. 1st September, 1942.

1. (1928) 56 M.L.J. 369: I.L.R. 52 Mad. 361 (F.B.).
2. (1929) 57 M.L.J. 22: I.L.R. 52 Mad. 584 (F.B.).
3. (1935) 70 M.L.J. 105: L.R. 63 I.A. 47: I.L.R. 15 Pat. 268 (P.C.).
4. A.I.R. 1928 P.C. 128 (P.C.).

Examiner of Local Fund Accounts, Madras v. Subramania Mudaliar.

particular sections in particular statutes. We uphold the preliminary objection and rule that these appeals do not lie.

The learned Government Pleader then asks us to treat them as revision petitions but we see no indication of any such miscarriage of justice being involved in the alleged errors in the learned District Judge's procedure as would justify our interference.

The appeals are dismissed with costs of the contesting respondents.

K.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Natarajan Chettiar .. *Petitioner** (*Plff.*)

v.

Perumal Ammal and another .. *Respondents* (*Defts.*).

Natarajan Chettiar v. Perumal Ammal.

Hindu Women's Rights to Property Act (1937), *section* 3, *clauses* (2) *and* (3)—*Effect—Death of payee of promissory note—Assignment of note by widow of payee—Endorsee whether should procure succession certificate —Execution of note by Hindu coparcener—Liability of non-executant coparceners—Death of executant—Remedy against assets of deceased.*

A Hindu widow does not obtain the right given by section 3 (2) of the Hindu Women's Rights to Property Act, 1937, by survivorship. But it does not follow that because she does not obtain her right by survivorship that she must obtain it by inheritance. The effect of section 3, clauses (2) and (3) may be regarded as recognising a survival of the husband's persona in the wife giving her the same rights as her husband had, except that she can alienate property only under certain circumstances. Where a widow of the payee of a promissory note endorses the note in favour of another, the endorsee need not procure a succession certificate in favour of the widow before instituting a suit on the note.

The endorsee of a promissory note cannot sue a non-executant coparcener on the ground of his liability for a debt under the Hindu Law. Consequently the sons of the maker are liable only to the extent of the father's separate property that comes into their hands and not to the extent of his share of the joint family property.

Maruthamuthu Naicker v. *Kadir Badsha Rowther*, (1938) 1 M.L.J. 378: I.L.R. 1938 Mad. 568 (F.B.), relied on.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Palani, dated 7th September, 1940 and passed in S.C.S. No. 114 of 1940.

C. A. Seshagiri Sastri for Petitioner.

K. S. Ramamurthi for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is an indorsee from the widow and the two sons of the payee, while the defendants are the widow and the son of the maker of the promissory note. The suit was dismissed by the District Munsiff of Palni on two grounds. The first was that the plaintiff could not succeed without a succession certificate and the second was that the members of the family of the deceased maker of the note could not be made liable for an obligation of the deceased under a promis-

*C.R.P. No. 167 of 1941. 18th August, 1942.

Natarajan Chettiar v. Perumal Ammal.

sory note. He relied on the Full Bench decision reported in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*.[1]

The first point turns on the effect of section 3 of the Hindu Women's Rights to Property Act, 1937, which says that

> "When a Hindu governed by any School of Hindu law other than the Dhayabag School or by customary law dies intestate having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3) have in the property the same interest as he himself had":

and it adds in sub-section (3) that

> "Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner."

I agree with the learned advocate for the respondents that the widow does not obtain the right given under this section by survivorship. She was not a coparcener before her husband's death and she was not one afterwards. I do not however think that it follows that because the widow does not obtain her right by survivorship that she must obtain it by inheritance. The effect of section 3, clauses (2) and (3), may be regarded as a survival of the husband's persona in the wife, giving her the same rights as her husband had except that she can alienate property only under certain circumstances. As the widow did not inherit her right, no succession certificate is necessary.

It is conceded that the indorsement in the plaintiff's favour is an indorsement of the rights under the promissory note and not of the debt on which the promissory note was based. It would therefore follow that the rights which the plaintiff has against the defendants would be only those which arise under the obligations of the defendants to discharge the maker's obligation under the promissory note. It is not denied that in so far as the estate of the maker of the promissory note comes into the hands of the defendants, they are liable to discharge his debts. That is the ordinary obligation of legal representatives under the mercantile law; but the question is whether the sons are liable under the pious obligation theory to discharge their father's obligations under the promissory note. It was pointed out by Varadachariar, J., in *Narayana Rao* v. *Venkatappayya*[2] that it is impossible to reconcile obligations that arise in mercantile law with the principles of ancient Hindu law and that the provisions of the Negotiable Instruments Act ought not to be extended to make liable persons who would be liable only for debts under the ordinary Hindu law. So that the sons, who would be liable for their father's debt, cannot be held by analogy to be also liable for the obligations of their father which arise out of his execution of the promissory note. Although this particular question did not directly arise in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[1] the learned Judges there pointed out that the indorsee cannot sue a non-executant co-parcener on the ground of his liability for a debt under the Hindu law. So the

1. (1938) 1 M.L.J. 378: I.L.R. 1938 Mad. 568 (F.B.).
2. (1937) 1 M.L.J. 543: I.L.R. 1937 Mad. 299.

Natarajan Chettiar v. Perumal Ammal.

sons are liable only to the extent of the father's separate property that comes into their hands and not to the extent of his share of the joint family property.

If in passing a decree in the plaintiff's favour it were merely said that the property of the deceased in the hands of the defendants would be liable for the debt, then the plaintiff would probably be able to invoke section 53 of the Code of Civil Procedure when he came to execute his decree; but as I am satisfied that the obligation of the defendants is limited to the separate estate of the deceased in their hands, the proper decree to pass would be one against that separate estate of the maker in their hands.

The petition is allowed and a decree passed in favour of the plaintiff for the suit amount against the separate estate of the deceased maker in the defendants' hands, together with future interest. As this was not what the plaintiff asked for in his plaint, I think that no interference with the order of the lower Court as to costs is called for. In this Court the petitioner has substantially failed and has succeeded only with regard to a relief which he did not ask for in his plaint. In this Court the petitioner will therefore pay the respondents' costs.

B.V.V. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Bichal Naidu and others .. *Petitioners** (*Accused*).

Bichal Naidu *In re.*

Motor Vehicles Act (IV of 1939), *section* 71 (2)—*Fixing of speed limit—Decision of Regional Transport Board—Absence of notification in Gazette—Person exceeding speed limit—Whether liable to conviction.*

The notification under section 71 (2) of the Motor Vehicles Act is the fixing of the maximum speed limits and until the restriction is notified the speed limit is not fixed. The decision arrived at by the Regional Transport Board or other body authorised to fix speed limits remains only a decision and does not come into operation until it has been notified in the Gazette and persons infringing the speed limit before the notification cannot be convicted of an offence under the Act.

Petitions under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgments of the City First Class Magistrate of Madura in C.A. Nos. 99 to 102 of 1941 preferred against the judgments of the Court of the Sub-Magistrate, Madura Town in C.C. Nos. 769, etc. of 1941.

..*C. K. Venkatanarasimhan* for Petitioners.

K. Venkataraghavachari for the Public Prosecutor for the Crown.

The Court made the following

ORDER.—The petitioners in all these cases were convicted for driving their buses at a speed exceeding that fixed by the Regional Transport Authority for application to the Madura Municipal limits. The speed fixed was a maximum of 15 miles an hour, and the petitioners were found to have been driving at speeds exceeding that by about three or four miles an hour.

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*Crl.R.C. Nos. 339 to 342 of 1942. (Crl.R.P. Nos. 329 to 332 of 1942.) 31st August, 1942.

It was admitted by the Police in the lower appellate Court that the fixing of the speed limit by the Municipality was not published by notification until the 24th November, 1941, whereas the offences which were the subject of these petitions were committed on the 9th August, 1941. The question is whether a notification is necessary before an offence can be committed or whether notification is merely a method of publishing the speeds fixed, so that those using the roads may know what speeds have been fixed. The Police have said—and the Magistrates have believed them—that the petitioners and others were informed long before these offences were committed that the speed of 15 miles an hour had been fixed for municipal limits in Madura. I must accept these concurrent findings. The lower appellate Court thought that although the fixing of the speeds was not notified, the offence was committed, because the petitioners knew that the speeds had been fixed at 15 miles an hour.

Section 71 (2) of the Motor Vehicles Act, which permits the restricting of speed within certain areas, says that,

> "The Provincial Government or any authority authorised in this behalf by the Provincial Government may . . . . by notification in the Official Gazette fix such maximum speed limits as it thinks fit. . . ."

It is seen from the wording of this sub-section that the *notification* is the *fixing,* from which it follows that until the restriction has been notified, the speed limit is not fixed. The decision arrived at by the Regional Transport Board or other body authorised to fix speeds remains only a decision until it has been notified in the Gazette. Then and only then, can it be said that speed has been fixed. That that is what the Legislature intended is further shown by section 133 of the same Act, where it is said that,

> "Every power to make rules given by this Act is subject to the condition of the rules being made after previous publication."

The second clause of the same section is even clearer, for it says,

> "All rules made under this Act shall be published in the official Gazette and shall, unless some later date is appointed, come into force on the date of such publication."

So that no decision with regard to the speed limit to be imposed in any area can come into operation before the date of publication. In the present case, whatever may have been the date on which the Regional Transport Authority came to its decision to restrict speeds within the Madura Municipality to 15 miles an hour, that decision did not operate as law until it was published by notification on the 24th November, 1941. It follows that there was no legal restriction of speeds in the Madura Municipality below the speed of 30 miles an hour, given in the Schedule VIII before the 24th November, 1941. So that when the petitioners drove their buses at 18 miles an hour, they were keeping well within the limits allowed.

The convictions and sentences are therefore set aside and the fines, if paid, are ordered to be refunded.

B.V.V. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Haji Kadir Murthuza Hussain Saheb, represented by his power of attorney agent, M. G. Hasan .. *Petitioner** (*Petr.*)

v.

Mohammed Murthuza Hussain Sahib .. *Respondent* (*Respt.*).

Haji Kadir Murthuza Hussain Saheb *v.* Mohammed Murthuza Hussain Sahib.

Mussalman Wakf Validating Act (VI of 1913), section 3—Wakfs validated under—Application under the Mussalman Wakf Act (XLII of 1923), sections 2 (e), 3, 5 and 10—When maintainable in respect of wakfs.

The words "for the maintenance and support wholly or partially of his family and children or descendants" in section 3 of Act VI of 1913, describe two possible sizes of wakfs, the first one being sufficiently large to maintain the family completely and the second one being insufficiently large for this purpose. The wakfs which are validated by that Act are those which are primarily and wholly for the purpose of supporting and maintaining the family, children or descendants of the creator of the wakf. All that the Act requires is that in case the family should one day become extinct there should be a provision in the wakf for the benefit of some religious, pious or charitable purpose.

Where a wakf subserves two purposes, partly charitable and partly private, a petition to the District Judge under sections 3, 5 and 10 of the Mussalman Wakf Act XLII of 1923 is maintainable as such a wakf will not be excluded from the purview of that Act by reason of the definition of "wakf" found in section 2 (*e*).

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of Chingleput, dated 27th August, 1941 and made in O.P. No. 71 of 1941.

M. S. Venkatarama Aiyar for Petitioner.

C. Krishnamachariar for Respondent.

The Court delivered the following

JUDGMENT.—This petition arises out of an application by the petitioner under sections 3, 5 and 10 of Act XLII of 1923 to the learned District Judge of Chingleput with reference to a certain wakf. The learned District Judge held that the wakf in question was excluded from the purview of Act XLII of 1923 by reason of the definition found in section 2 (*e*). That definition says that wakf does not include any wakf such as described in section 3 of the Mussalman Wakf Validating Act VI of 1913 under which any benefit is for the time being claimable for himself by the person by whom the wakf is created or by any member of his family or descendants. The facts in regard to this wakf are undisputed that it was originally created about 70 or 80 years ago to provide facilities for travellers on the road from Madras to Nellore; *i.e.*, to subserve a charitable purpose. Provision was also made in the document which established it for the enjoyment by the original creator of the wakf and the members of his family of any surplus income that might arise owing to an increase in the population of Madras, or any other cause in future. Apparently at the time when this application was made there had been such an increase of income and the income from

*C.R.P. No. 2753 of 1941. 2nd October, 1942.

Haji Kadir Murthuza Hussain Saheb *v.* Mohammed Murthuza Hussain Sahib.

the wakf properties went partly to charitable purposes and partly for the maintenance of the family of the creator of the wakf.

Under section 3 of Act VI of 1913 certain wakfs are validated. The first of these is a wakf for the maintenance and support wholly or partially of his family, children or descendants by a person professing Mussalman faith. It is evidently under this sub-section that the learned District Judge must have thought that the present wakf came. It seems to me that this view is mistaken, that section 3 (*a*) of Act VI of 1913 cannot apply to wakfs which subserve two purposes partly charitable and partly private, but must apply to wakfs originally designed to serve one purpose only and that is private. "For the maintenance and support wholly or partially of his family, children or descendants" describes two possible sizes of wakfs, the first one being sufficiently large to maintain the family completely and the second one being insufficiently large for this purpose. That this must be the meaning of the phrase seems to me clear from the use of the word "ultimate" in the proviso. The proviso is,

"Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character."

The existence of this proviso in the section shows, I think, beyond all possibility of dispute that the wakfs which the section validates are those which are primarily and wholly for the purpose of supporting and maintaining the family, children or descendants of the creator of the wakf. All that the Act requires is that in case the family should one day become extinct there should be a provision in the wakf for the benefit of some religious, pious or charitable purpose. I am of opinion therefore that the learned District Judge was wrong in holding that this wakf was excluded from the Act. It follows therefore that the application ought not to have been dismissed on the ground that the Act did not apply and therefore the Judge had no jurisdiction to deal with it in any other way than to dismiss it.

The petition must be allowed and the application restored to file and disposed of on its merits. The respondent must pay the petitioner's costs of this petition.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KUNHI RAMAN.

Sait Parasuram Byas .. *Appellant** (*4th Respt.*)

v.

Matte Atchutaramarao .. *Respondent* (*Petr.*).

Parasuram Byas *v.* Atchutaramarao.

Court-Fees Act (VII of 1870), section 11—Decree in suit to render account of administration—Additional court-fee ordered—Deposit of decree amount in Court—Plaintiff drawing the amount after paying in additional court-fee—Execution application by him for the additional court-fee—Right to recover whether existed after decree had mentioned the amount.

*A.A.O. No. 299 of 1941. 13th August, 1942.

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In a suit by the plaintiff to render an account of the administration of an estate, it was found upon adjudication in favour of plaintiff that a larger sum than what was claimed by the plaintiff was due to him and in accordance with the provisions of section 11 of the Court-Fees Act, a clause was inserted in the decree that the decree should not be executed unless the plaintiff paid the further court-fee which would have been payable if he had originally sued for the sum decreed. Therefore, when the plaintiff attempted to withdraw the decree amount deposited by defendants in Court, the Court refused to issue any cheque for the amount deposited unless the plaintiff paid the additional court-fee mentioned in the decree. The plaintiff paid accordingly and the amount deposited was made over to him by cheque. The plaintiff later on filed an execution application under the decree to recover from the defendant the additional court-fee paid by him,

Held, that where the defendant's liability was likely and indeed almost certain to be increased by the additional sum in the matter of costs, his payment of a total sum which ignored that contingency cannot be held to be a complete satisfaction of the decree and therefore the execution application would lie.

Appeal against the order of the District Court of East Godavari at Rajahmundry, dated 3rd January, 1941 and made in E.P. No. 58 of 1940 in O.S. No. 41 of 1936.

M. S. Ramachandra Rao and *M. Krishna Rao* for Appellant.

K. Bhimasankaram for Respondent.

The Judgment of the Court was delivered by

King, J.

King, J.—The appellant here is one of the judgment-debtors under the decree in O.S. No. 41 of 1936, in the Court of the District Judge of East Godavari. That decree was passed in a suit by the plaintiff to direct the defendants to render an account of their administration of an estate; and as usual in such suits, originally court-fee was paid upon the estimated value of the decree expected. It was found upon adjudication that a larger sum than this was due to the plaintiff and in accordance with the provisions of section 11 of the Court Fees Act, a clause was inserted in the decree that the decree should not be executed unless the plaintiff pays a further court-fee or Rs. 157-8-0, which would have been payable if he had originally sued for the sum decreed. After this decree was passed, the 4th defendant is said to have offered to plaintiff the amount due under the decree out of Court. The plaintiff, however, refused to receive it and thereupon the 4th defendant deposited that amount in Court. There was then an application by the plaintiff to withdraw the amount. The Court refused to issue any cheque for the amount deposited unless plaintiff paid the additional court-fee stipulated for in the decree. The plaintiff accordingly paid this sum and the amount deposited was made over to him by cheque. After this the plaintiff has filed the present execution application to recover from the 4th defendant under the decree the amount of the additional court-fee which he had to pay, and this execution petition has been ordered. Fourth defendant has consequently appealed.

The argument in the appeal is that the order of the Court insisting upon plaintiff depositing additional court-fees before being allowed to obtain the cheque is wrong, that the 4th defendant by paying into Court all that was due on that particular day on the decree has completely satisfied the decree, that the

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Court has no discretion but to issue an order unconditionally to the plaintiff for a cheque for the amount of this deposit and that as the decree has thus been fully satisfied before the payment of Rs. 157-8-0, was made by the plaintiff he can no longer seek to execute it.

Learned counsel for the appellant relied upon a ruling reported in *Balaguruswami Naicken* v. *Guruswami Naicken*.[1] That was a case where money had been deposited by the judgment-debtor into Court in 1920. The immediate question before the learned Judges was one of limitation. There had been an execution application in 1917 and there was a later execution application in 1923 and it was held that the application of the decree-holder to withdraw by means of a cheque the money which the judgment-debtor had deposited in Court was not an application in execution or a step-in-aid of it, the reason being that the Court could make the payment without any reference to the judgment-debtor, and that it was a formal and almost automatic act on the part of the Court. A distinction was drawn between such money and money which had been deposited in Court as a result of proceedings taken in execution; but in that case the money was deposited voluntarily and therefore an application to receive a cheque was not an application in execution. It has accordingly been argued that in the present case where the money was voluntarily deposited there was no application in execution by the plaintiff, and as an extension of that argument it is sought to establish that there could not be an application in execution as execution was already over. We are not prepared to hold that this extension can be justified. It is no doubt true that the fourth defendant had deposited in Court on a particular day all that could be declared to be due by him under the decree on that day. But we do not see how that fact is sufficient for the proposition that he had completely satisfied the decree. We must read the decree as a whole just as the executing Court, when faced with the necessity of deciding whether to issue a cheque to the plaintiff or not, is bound to do. And if one reads the decree as a whole, one is compelled to conclude that it is not until the plaintiff actually pays the additional court-fee, which is obligatory upon him according to the terms of the decree, that the full liability of the fourth defendant will be ascertained. It cannot and has not been denied that if this payment of additional court-fee by the plaintiff had been made before the decree was fully satisfied, then the plaintiff had every right to take steps in execution against the fourth defendant to reimburse himself. And, as we have said, it seems to us impossible to hold that where the fourth defendant's liability is likely and indeed almost certain to be increased by this additional sum in the matter of costs, his payment of a total sum which ignores this contingency can be held to be a complete satisfaction of the decree.

In these circumstances we are of opinion that the learned Judge, although he did not himself discuss this matter in any detail, in a very brief order, has come to the right conclusion that

1. (1924) 48 M.L.J. 506.

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the execution petition filed by the plaintiff was a competent one and execution ought to be ordered. The appeal accordingly fails and is dismissed with costs.

K.C. Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Venkataramayyar v. Ayyasami Sastrigal.

A. Venkataramayyar .. *Appellant** (*Plff.*)

v.

A. S. Ayyasami Sastrigal and others .. *Respondents* (*Defts.*).

Madras Agriculturists' Relief Act (IV of 1938), section 3 (2) Proviso C—Madras District Municipalities Act (V of 1920), section 82—Payment of house property tax—Criterion for application of the Act—Net annual rental or gross annual rental.

Where the mortgagors of a property were held entitled to the benefits of the Act IV of 1938, because of their saleable interest in agricultural lands, but it was contended that they were disqualified because as members of a joint family they were assessed to property tax or house tax under the District Municipalities Act, 1920, on property the aggregate annual rental value of which was more than Rs. 600, on the question whether the limit in Proviso C to section 3 (2) of Act IV of 1938 meant the net or gross annual rental value,

Held, that the annual rental value in Proviso C is the net figure after making the statutory deduction and not the gross rental.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 7 of 1939, dated 29th June, 1940.

M. S. Venkatarama Aiyar and S. *Swaminathan* for Appellant.

K. S. Desikan for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This appeal raises a question of the interpretation of Proviso C to section 3 (2) of Madras Act IV of 1938. The appellant was the plaintiff in a suit on a mortgage and the only question now remaining is whether the respondents the mortgagors, have been rightly held entitled to the benefits of Act IV of 1938 as being agriculturists. That they have a saleable interest in agricultural lands is not denied, but it is contended that they are disqualified because as members of a joint family they are assessed to property or house-tax under the Madras District Municipalities Act, 1920, on property the aggregate annual rental value of which is more than Rs. 600. It appears that in the name of the 1st defendant there are two houses, the gross rental value of which was estimated by the municipality at Rs. 460 per annum and the net value at Rs. 423, after deducting 10 per cent. as laid down in section 82 of the District Municipalities Act. In the name of the 2nd defendant, who is the brother of the 1st defendant, there is one house the gross rental value of which has been estimated at Rs. 180 and the net value after making the 10 per cent. deduction at Rs. 164. Assuming that the defendants are to be disqualified, if at all, by the payment of property tax on properties in the name of any one of the coparceners, it will be seen that the properties owned by the family

*Appeal No. 33 of 1941. 16th September, 1942.

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are taxed on a net annual rental value of Rs. 587 which is below the limit down in the Proviso C. But if the gross annual rental value is the criterion, the figure would be Rs. 640, which is above the limit. It is argued that the phrase used in Proviso C is "annual rental value", not "annual value" and that the figure arrived at after making the deduction laid down in section 82 of the Madras District Municipalities Act is the figure which is described in that Act as the "annual value". This figure of annual value is arrived at by a process of deduction from what is alleged to be the true rental value. The argument is that the Legislature has avoided the use of the phrase "annual value" advisedly and in the first explanation to this proviso which says that where the assessment is based on the annual rental value the annual rental value shall be deemed to be such value, the Legislature contemplated not the "annual value" upon which the assessment is based under the District Municipalities Act, but that which would be regarded as the annual rental value apart from the special provisions of the Municipalities Act. Mr. Venkatarama Aiyar for the appellant has referred us to the English practice whereby the annual rental value in the rating statutes is the gross value whereas the rateable value is the value on which the tax is actually levied. It does not seem to us that the terminology used in the English rating statutes has very much bearing on the question which we have to decide, nor do we think that this question can be decided by over-emphasising the difference between the terminology in Proviso C and that used in the Madras District Municipalities Act; for it must be remembered that the disqualification in Proviso C applies to individuals who pay taxes on property, not merely under the Madras District Municipalities Act, but also under the City Municipal Act, the Cantonments Act, the Local Boards Act and under any law governing municipal or local bodies in any other province in British India or in any Indian State. The fact therefore that the phrase 'annual rental value' differs slightly from the phrase 'annual value' used in the two Municipal Acts cannot really decide the question. The proviso imposes a disqualification based on payment of taxes under a variety of statutes some of which were probably not before the Legislature when they framed this clause. The phrase used therefore is necessarily a general phrase and we have to consider what is the effect of this phrase having regard to the definitions of it in the explanation.

When the explanation says that the annual rental value on which the assessment is based shall be deemed to be the annual rental value, surely the natural interpretation is to take the final figure of rental value on which the assessment is based as the annual rental value for the purposes of this proviso. It seems to be stretching the language of the explanation to treat as the annual rental value not the net figure on which the assessment is based but the gross figure which is used for the basis of an arithmetical process as a result of which the final figure on which the assessment is based is reached. It has also to be pointed out that under the proviso to sub-section (2) of section 82 of the Madras District Municipalities Act the annual value which is the subject

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of taxation may be estimated without any reference to rental value at all and in such circumstances it would be absurd to take the gross rent as the figure on which the tax is based.

Having regard to all these considerations, we are of opinion that the annual rental value in Proviso C is the net figure after making the statutory deduction and not the gross rental. The appeal therefore fails and is dismissed with costs.

K.C. ——— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

K. R. Sankaralingam Pillai and another .. *Appellants** (*Applt. 5th Respt.*)

v.

Veluchami Pillai, minor by adoptive mother and next friend, Chella Thayi *alias* Meenakshi Ammal and others .. *Respondents* (*Respts.* 1 *to* 4).

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Hindu law—Adoption by widow—Prior partition between surviving coparceners—Adopted son's right to demand re-partition.

An adoption by a widow dates back to the death of the adoptive father. Regard must be had to that date for the purpose of determining the rights of the adopted son. The existence of a co-parcenary at the date of the adoption into which the adopted son could be admitted is no longer material. The adoption is the over-riding factor and the adopted son will be entitled to a share in the family estate subject to lawful alienations made in the meantime. Partition does not amount to an alienation for this purpose. Accordingly a son adopted to a deceased coparcener is entitled to re-open a partition of family property effected by the surviving coparceners before the adoption took place.

(1942) 1 M.L.J. 119, affirmed.

Appeal under Clause 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Venkataramana Rao, dated 10th November, 1941, and passed in S.A. No. 1113 of 1938, preferred against the decree of the District Court of Madura in A.S. No. 31 of 1938 (O.S. No. 20 of 1937, Sub-Court, Madura).

K. Rajah Aiyar for Appellants.

B. Sitarama Rao, R. Ramasubbu Aiyar, S. K. Sundaram, K. V. Srinivasa Aiyar and *N. R. Govindachariar* for *Respondents.*

The Judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—This appeal raises the important question whether a son adopted to a deceased coparcener is entitled to reopen a partition of family property effected by the surviving coparceners before the adoption took place.

One K. Ramaswami Pillai had four sons, two of whom survived him. They are the 1st and 2nd defendants in this suit. The other two sons were K. R. Karuppanna Pillai, the deceased husband of the 6th defendant, and K. R. Ramaswami Pillai, the

*L.P.A. No. 11 of 1942. 8th October, 1942.

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deceased husband of Chellathayi, the adoptive mother of the plaintiff, who is a minor. The father and his sons were joint in estate. Both Karuppanna and Ramaswami died without issue in 1924. The father died in 1929 and in 1936 the 1st and 2nd defendants partitioned the family estate between themselves. Admittedly each is still in possession of a moiety of the estate. On the 25th January, 1937, Chellathayi adopted the plaintiff and a week later Karuppanna's widow adopted the 3rd defendant.

The suit out of which this appeal arises was filed by the adopted son of Ramaswami, suing through his mother as his next friend. He claimed to be entitled to recover one-fourth of the family estate. The 1st and 2nd defendants resisted the claim. Their main contentions were that the widow had no power to adopt after the partition of the family property and that in any event the plaintiff could not claim a re-partition. The suit was tried by the Additional Subordinate Judge of Madura, who granted the plaintiff the decree which he sought. This decision was concurred in by the District Judge on appeal. Both Courts were of the opinion that the plaintiff had been lawfully adopted and that the partition did not debar him from recovering a one-fourth share as the son of his father. The 1st defendant then appealed to this Court. The appeal was heard by Venkataramana Rao, J., who agreed with the Courts below that the partition of the estate by the 1st and 2nd defendants did not prevent the plaintiff from recovering his one-fourth share in the estate. The validity of the adoption was not challenged before Venkataramana Rao, J. The present appeal is from the judgment of the learned Judge and the sole question is whether the plaintiff has the right to demand a re-partition.

It has long been established that where property is taken by survivorship the widow's power to adopt is not affected. See *Sri Virada Pratapa Raghunath Deo* v. *Sri Brojo Kishore Patta Deo*,[1] *Bachoo Hurkisondas* v. *Mankorebai*,[2] *Yadao* v. *Namdeo*.[3] An adoption does not, however, affect the rights of an alienee of family property when the alienation is lawful, and, therefore, when surviving coparceners alienate family property, as they have the right to do, the adoption by the widow of a deceased coparcener of a son to her husband does not defeat the alienee. For the appellant it is argued that a partition amounts to alienation of the family properties and the surviving coparceners are in the same position as stranger alienees. We are not prepared to accept this proposition. The partition does not mean the extinction of the family. The members of the family are still there and so are the family assets. If the law recognises in an adopted son of a deceased coparcener the right to share in the estate as it existed before the partition, property which has not been lawfully alienated in the meantime is still within his reach. The question which falls for decision in this appeal cannot be decided on such a technical plea. In deciding the question whether the adopted

1. (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.).
2. (1907) 17 M.L.J. 343: L.R. 24 I.A. 107: I.L.R. 31 Bom. 373 (P.C.).
3. (1921) 42 M.L.J. 219: L.R. 48 I.A. 513: I.L.R. 49 Cal. 1 (P.C.).

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son is entitled to demand from the erstwhile coparceners his share regard must be had to principles of Hindu Law, and we will now proceed to examine those principles.

The adoption of a son by a widow to her deceased husband is deemed to date back to the husband's death, as the Privy Council has frequently pointed out. In *Jatindramohan Tagore* v. *Gnanendramohan Tagore*[1] Willes, J., delivering the judgment of the Board said,

"The Hindu Law recognises an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognises as in existence at the death of a testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him."

In *Madanamohana Deo* v. *Purushothama Deo*[2] the Judicial Committee, speaking of the power of a widow, remarked that by exercising the power conferred upon her, the widow of one Adikonda could establish a direct succession to the estate of her husband which relates back to his death. In *Pratapsingh Shivsingh* v. *Thakor Shri Agarsinghji Rajasanghji*[3] the Board said,

"Again, it is to be remembered that an adopted son is the continuator of his adoptive father's line exactly as an *aurasa* son, and that an adoption, so far as the continuity of the line is concerned, has a retrospective effect; whenever the adoption may be made there is no *hiatus* in the continuity of the line."

In *Gada Dhur Mallik* v. *Official Trustee of Bengal*,[4] the Judicial Committee observed,

"Apart from the case of a child *en ventre sa mere* or of an adopted child, the estate once vested in an heir will not be divested by the subsequent birth of a person who would have been a preferable heir had he been alive at the time of the death of the last owner."

In *Amarendra Mansingh* v. *Sanatan Singh*[5] the Privy Council expressed approval of the acceptance by Mr. Ameer Ali in *Pratap Sing's case*[3] of the view that among Hindus the male line is not regarded as extinct, or a man to have died without issue, until the continuation of the line by adoption is impossible.

In view of these very emphatic pronouncements of the Judicial Committee, an adoption must be taken to date back to the death of the adoptive father, which means that the adopted son is entitled to be put into possession of his adoptive father's share of the family estate, subject, of course, to lawful alienations in the meantime.

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1. (1872) L.R. I.A. Supp. Vol., p. 47 (P.C.).
2. (1918) 35 M.L.J. 138: L.R. 45 I.A. 156: I.L.R. 41 Mad. 855 at 859 (P.C.).
3. (1917) 36 M.L.J. 511: L.R. 46 I.A. 97: I.L.R. 43 Bom. 778 at 792 (P.C.).
4. (1940) 1 M.L.J. 834: L.R. 67 I.A. 129: I.L.R. (1940) 1 Cal. 415 at 439 (P.C.).
5. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 at 658 (P.C.).

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The posthumous son can claim a re-partition and so can the heir of a disqualified person and an absent coparcener. Placitum 8 of section VI of Chapter I of the Mitakshara (S.S. Setlur's Hindu Law Books on Inheritance, 1911, page 20) says,

"When brothers have made a partition, subsequently to their father's death, how shall a share be allotted to a son born afterwards?"

The author replies,

"His allotment must absolutely be made out of the visible estate corrected for income and expenditure."—(Yajnavalkya, ii, 123.)

With regard to the disqualified person, placitum 7 of section 10 of Chapter I (S.S. Setlur's Hindu Law Books on Inheritance, page 54) says,

"If the defect be removed by medicaments or other means at a period subsequent to partition the right of participation takes effect, on the same principle on which 'when the sons have been separated, one, who is afterwards born of a woman equal in class, shares the distribution' (Yajnavalkya ii, 123) is based."

Placita 9 and 10 deal with the rights of the heir of such a person. Placitum 9 says,

"The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds:

'But their sons, whether legitimate, or the offspring of the wife of a kinsman, are entitled to allotments, if free from similar defects.' " (Yajnavalkya, ii, 142.)

Placitum 10 says,

"The sons of these persons, whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares; provided they be faultless or free from defects which should bar their participation, such as impotency, and etc."

The absent coparcener's right is recognised in placita 24 and 25 of Chapter XXV of Brihaspathi (Sacred Books of the East, Volume XXXIII, page 373):

"24. When a man has gone abroad, leaving the joint estate of his family, his share must undoubtedly be given to his descendant who has returned from abroad.

25. Whether he be the third or the fifth or even the seventh in descent, he shall receive the share belonging to him by right of succession, his birth and family name having been ascertained (first)."

Mr. Rajah Aiyar has contended that as there is no specific text dealing with the right of the adopted son to claim a re-partition it must be assumed that there is no such right. Ancient texts are, however, not exhaustive, and in order that justice shall not be defeated, the Courts have from time to time had to amplify them in accordance with the spirit of Hindu Law. The texts just quoted indicate a principle and we can see no reason why an adopted son should be placed in a position inferior to the posthumous son, the heir of a disqualified coparcener and the absent coparcener, especially as the adoption dates back to the date of the death of the adoptive father.

Further reasons can be given in support of the opinion that an adopted son has the right to demand a re-partition. In the judgment in *Krishna* v. *Sami*,[1] which was decided by a Full Bench of five Judges of this Court (Turner, C.J., Kernan, Muttuswami Aiyar, Hutchins and Brandt, JJ.,) there is this statement,

1. (1885) I.L.R. 9 Mad. 64 (F.B.).

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"Again, let *C* have died before partition, leaving a widow and having given her power to adopt which she does not exercise till after a partition has been made by *B*, *D* and E (sons of *C*). When she exercises her power we apprehend that the adopted son would be entitled to call upon his uncles to make over to him a portion of the wealth equal to that which would have been taken by his father."—*Sri Raghunath* v. *Sri Brojo Kishoro*.[1]

Mr. Rajah Aiyar has asked us to ignore this statement of the law as being *obiter dictum*. The statement may fall within that category; but it is the statement of a learned Chief Justice delivering the judgment of a Full Bench and is therefore entitled to great weight.

The question arose directly in a case decided by a Bench of the Nagpur High Court, *Bajirao* v. *Ramakrishna*,[2] where it was held that while a partition may affect the coparceners *inter se*, it will not affect the subsequent rights of a son adopted by a widow of a deceased coparcener. So far as the adopted son is concerned, the family will be deemed to continue to be joint, and he will be entitled to a share in the family property, as if the partition had not taken place.

In Sir Thomas Strange's "Hindu Law" (Third edition, Volume I, page 232) we have this statement,

"Wherever, from any cause not understood at the time, the division proves to have been *unequal* or in any respect, *defective*, it may be set to rights, notwithstanding the maxim that, 'once is partition of inheritance made' (Manu Chapter IX, 47—3, Dig. 214) a position, that supposes it to have been fair, and made according to law."

Until the Privy Council delivered the judgment in *Amarendra Mansingh* v. *Sanatan Singh*,[3] it was generally understood that the vesting of an estate on inheritance defeated the widow's power to adopt. See *Mussamat Bhoobun Moyee Debia* v. *Ramakishore Acharj Chowdhry*,[4] *Padmakumari Devi* v. *Court of Wards*,[5] *Taracharan Chatterjee* v. *Sureshchander Mukerji*,[6] *Madana Mohana Deo* v. *Purushothama Deo*.[7] In *Amarendra Mansingh* v. *Sanatan Singh*,[3] after reviewing the previous decisions having bearing on the point, the Judicial Committee decided that the devolving of an estate of inheritance did not defeat the widow's power. Emphasis was laid on the peculiar religious significance which the Hindu Law attaches to the son. In that case the facts were these. On the 20th July, 1898, Raja Brojendra, the holder of an impartible estate, being then without issue, executed a deed authorizing his widow to adopt should he die without leaving a son, or if he did, the son should die. In 1902 a son was born to Raja Brojendra, who died in 1903. The son died on the 10th December, 1922, unmarried. A week later his mother adopted Amarendra the appellant. The validity of the adoption was challenged by Banamali, a distant cousin of Raja Brojendra, who

1. (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.).
2. I.L.R. 1941 Nag. 707.
3. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
4. (1865) 10 M.I.A. 279 (P.C.).
5. (1881) L.R. 8 I.A. 229: I.L.R. 8 Cal. 302 (P.C.).
6. (1889) L.R. 16 I.A. 166: I.L.R. 17 Cal. 122 (P.C.).
7. (1918) 35 M.L.J. 138: L.R. 45 I.A. 156: I.L.R. 41 Mad. 855 (P.C.).

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filed a suit to establish his right to the estate as the heir of Raja Brojendra. Both Courts in India held that Amarendra's adoption was invalid and decreed Banamali's suit. As the result he became entitled to the possession of the estate. The Judicial Committee held that the adoption of Amarendra was valid and that he was entitled to succeed to the estate notwithstanding that it had devolved on Banamali.

In *Amarendra Mansingh* v. *Sanatan Singh*[1] the arguments for the contesting respondent were twofold and are stated by Sir George Lowndes, who delivered the judgment of the Board, in these words:

> "First it was said that treating Banamali as a separated sapinda claiming strictly by inheritance—the basis upon which the claim was laid in the plaint—the authorities established that when once the estate had vested in an heir of the last male holder, other than the adopting widow, the power of adoption was at an end. If this were the true view, inasmuch as the Rani was precluded by the custom from inheriting to her son Bibudendra, she could no longer adopt.
>
> In the second place, it was said that where the husband from whom the power to adopt was derived left a son to succeed him, and that son attained full legal capacity to continue the line, the power of his mother was equally at an end, and that this would be the case whether the family was separate or joint."

Both these contentions were expressly negatived by the Board. If an adoption can divest an estate acquired by the law of inheritance it is difficult to see why the adopted son should be deprived of his share when the rule of survivorship applies simply because the other members of the family have distributed the assets among themselves.

The arguments in favour of a right in the adopted son to demand his share in the family estate, notwithstanding that the other coparceners have already partitioned it, may be summarized as follows:

(1) It is a rule of Hindu Law that an adoption dates back to the date of the death of the father; (2) There is no reason why an adopted son should be placed in an inferior position to that of the posthumous son, the heir of a disqualified person and the absent coparcener; (3) The right of the adopted son to demand re-partition has been recognized in two cases, *Krishna* v. *Sami*[2] and *Bajirao* v. *Ramakrishna*;[3] (4) There is support to be found for the proposition in Strange; (5) As an adoption divests an estate of inheritance it would be unjust to deny to the adopted son the right of claiming a re-partition when the rule of survivorship applies.

We consider that there is ample authority here to support the judgments of the Courts below, but as Mr. Rajah Ayyar has quoted the decisions of the Bombay High Court in *Hirachand Gangji* v. *Sojpal*[4] and *Irappa Lokappa* v. *Rachayya Madivallayya*,[5] we will refer to them. In the former case, Rangnekar, J.,

1. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).
2. (1885) I.L.R. 9 Mad. 64 (F.B.).
3. I.L.R. 1941 Nag. 707.
4. I.L.R. 1939 Bom. 512.
5. I.L.R. 1940 Bom. 42.

F.B.

Sankaralingam Pillai *v.* Veluchami Pillai.

Leach, C.J.

expressed the opinion that the coparcenary became extinct on partition and therefore the power of the widow to adopt was gone. The basis of this decision was that there was no undivided family into which the adopted son could be admitted by virtue of his adoption. In the second of these cases, a Bench of the Bombay High Court concurred in this decision. With great respect for this opinion we are unable to agree with it. After partition the coparcenary may be extinct as between the members who were parties to the partition, but the rights of others are not affected unless they claim under or through them. This is shown by the right of the posthumous son, of the heir of the disqualified person and of the absent coparcener to demand a re-partition. Moreover, it runs contrary to the well settled rule of Hindu Law that an adoption dates back to the death of the adoptive father. It is to that date, we must have regard, not, of course, for the purpose of deciding the validity of the adoption, for *Amarendra Mansing* v. *Sanatan Sing*[1] has done away with the distinction between devolution by survivorship and devolution by inheritance, but for the purpose of determining the rights of the adopted son. The existence of a coparcenary at the date of the adoption is no longer material. The adoption is the overriding factor and restores the position so far as the adopted son is concerned, subject to lawful alienations in the meantime.

We hold that the case was rightly decided below and consequently the appeal will be dismissed with costs in favour of the 1st respondent.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Bashyam *v.* Corporation of Madras.

J. Bashyam .. *Appellant** (*Deft.*)

v.

The Corporation of Madras .. *Respondent* (*Plff.*).

Madras City Municipal Act (IV of 1919), *section* 80 *and sections* 380 *to* 384—*Schedule V, rules* 1 *to* 3—*Owner or occupier ordered to construct flush-out latrine—Occupier agreeing with Corporation to have it done by the latter—Contract—Power to enter into contract granted to Corporation.*

Section 80 (1) of the Madras City Municipal Act (IV of 1919), read with the further provisions contained in rules 1 and 3 of Schedule V gives the Corporation full power to enter into a contract with any owner of premises for the purpose of constructing a flush-out latrine. Sections 380 to 384 of the Act do not preclude the Corporation from entering into a contract with the owner or occupier of a property to do the work of construction for him. The Corporation can follow the procedure laid down in sections 380 to 384, but it does not need to do so if the owner or occupier who is required to do the work agrees to the Corporation doing it for him.

Appeal against the decree of the Court of the City Civil Judge, Madras in O.S. No. 3825 of 1939.

V. Rajagopala Mudaliar for Appellant.

A. Suryanarayaniah for Respondent.

The Judgment of the Court was delivered by

1. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.).

*C.C.C.A. No. 25 of 1941. 20th August, 1942.

Bashyam v. Corporation of Madras.

Leach, C.J.

The Chief Justice.—The appellant is the owner of a house known as 28, Krishnappa Mudali Street, Madras. The Commissioner of the Madras Corporation served a notice upon him requiring him to provide a flush-out latrine for the use of the persons living on the premises. Section 186 of the City Municipal Act says that the Commissioner may require the owner or occupier within such time and in accordance with such directions as may be specified to provide a flush-out latrine or alter or remove from an unsuitable to a more suitable place any existing latrine. In accordance with the usual practice this notice was accompanied by an offer from the Corporation to carry out the work on behalf of the occupier provided that he agreed to pay the costs. A plan of the new latrine which was required also accompanied the notice. The appellant accepted the offer of the Corporation to do the work and paid the required initial deposit of Rs. 12. The contract was reduced to writing and signed by the parties. It provided that the Corporation should construct the latrine in accordance with the plan, that it should keep an account of the cost, that the appellant should pay the cost by monthly instalments of Rs. 5 and that the outstanding balance should bear interest at 9 per cent. per annum from the date of the completion of the work. The document further provided that the Corporation should have a charge on the property for the amount due to it under the agreement, which was duly registered. According to the Corporation the costs amounted to Rs. 73-10-8 and the appellant was required to pay the amount in accordance with the agreement. He failed to do so and the Corporation was compelled to file the suit out of which this appeal arises. It asked for a decree for Rs. 73-10-8 and in default of payment for an order directing that the property should be sold. After a full hearing the appellant was directed to pay Rs. 56-13-2 with interest and costs.

Notwithstanding that the Corporation had carried out the work according to the plan the appellant advanced the plea that the Corporation had no power to enter into the contract and therefore he should not be compelled to pay anything. The appellant's attitude can only be described as dishonest, but he has persisted in his plea and now asks the Court to set aside the decree passed against him on technical grounds. Dishonest though the attitude of the appellant is, his plea must be considered. We have considered it and we agree with the City Civil Court that there is no substance in it.

Sub-section (1) to section 80 of the Madras City Municipal Act (IV of 1919) states that the Corporation may enter into and perform all such contracts as it may consider necessary or expedient for carrying into effect the provisions of the Act. Rule 1 of Schedule V to the Act states that the purposes to which the Municipal fund may be applied include all objects expressly declared obligatory or discretionary by laws or rules, and in general everything necessary for or conducive to the safety, health, convenience or education of the citizens of Madras or to the amenities of the City and everything incidental to the administration. Rule 3 expressly provides that the objects of expendi-

Bashyam v. Corporation of Madras.

Leach, C.J.

ture connected with the public health include the construction, establishment, maintenance, supervision and control of latrines. Section 80 read with the further provisions contained in rules 1 and 3 of Schedule V gave the Corporation full power to enter into the contract with the appellant.

His learned advocate says that these provisions should not be applied because of what is stated in sections 380 to 384 of the Act. Section 380 says that whenever by a notice, requisition, or order under the Act or under any rule, by-law or regulation made under it, a person is required to execute a work, a reasonable time shall be named in the notice, requisition or order within which the work shall be executed. If there is default in compliance the Commissioner may cause the work to be executed. Section 381 provides for the recovery of the expenses from the person in default. Section 382 gives the Commissioner power to agree to receive the payment in instalments and section 383 to declare, with the approval of the Standing Committee, expenses incurred on certain works to be improvement expenses. Section 384 says that the improvement expenses shall be a charge upon the property.

The argument is that the Corporation was bound to serve notice requiring the work to be done and could only carry out the work itself when the owner or occupier has defaulted. These sections do not, however, preclude the Corporation from entering into a contract with the owner or occupier of the property to do the work for him. The Corporation can follow the procedure laid down in sections 380 to 384, but it does not need to do so if the owner or occupier who is required to do the work agrees to the Corporation doing it for him. The real question is whether the Corporation has power to enter into such a contract and as we have already indicated we consider that it has ample power by reason of section 80 read with rules 1 and 3 of Schedule V.

The attitude of the appellant throughout this case is deserving of strong condemnation.

The appeal will be dismissed with costs.

K.C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Chinnappa Chetty, *In re.*

Chinnappa Chetty and another .. *Appellants** (*Accused*).

Criminal Procedure Code (V of 1898), *sections* 234, 236 *and* 239—*Charge for offence under sections* 380 *and* 411, *Indian Penal Code—One accused convicted under section* 380, *the other under section* 411—*Misjoinder of charges—Legality of conviction.*

Section 234 read with section 239, Criminal Procedure Code, permits of the joinder of more offences than one of the same kind committed within the space of twelve months; but the offences under sections 380 and 411, Indian Penal Code, are not of the same kind, nor are they punishable with the same maximum term of imprisonment. So that the charging of one or more persons of offences under section 380 and section 411 would amount to a misjoinder of charges although there is a specific provision in section 236, Criminal Procedure Code, for charging a person in the alternative with regard to any one offence.

*Crl. A. Nos. 286 and 312 of 1942. 1st September, 1942.

Held, however, that in the particular case the trial was not vitiated on account of the misjoinder as no prejudice was caused to the accused, and that the conviction of the first accused under section 380 and the second accused under section 411, Indian Penal Code, need not be set aside. Chinnappa Chetty, *In re.*

Appeals against the order of the Court of Session of the Coimbatore Division, dated 12th March, 1942, and made in C.C. No. 14 of 1942.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

Accused not represented.

The Court delivered the following

JUDGMENT.—The first accused (appellant in C.A. No. 312 of 1942) was convicted by the Sessions Judge of Coimbatore of an offence punishable under section 380, Indian Penal Code, and the second accused (appellant in C.A. No. 286 of 1942) of an offence punishable under section 411, Indian Penal Code, in connection with the same stolen articles.

The trial was with jury; and I do not think that much can be said against the charge to the jury; but there seems to have been a misjoinder of charges. Both the appellants were charged with regard to two offences in which they were alleged to have been jointly connected alternatively under section 380 or 411, Indian Penal Code. Section 234 read with section 239, Criminal Procedure Code, permits of the joinder of more offences than one of the same kind committed within the space of 12 months; but it has been more than once laid down that offences under sections 380 and 411 are not of the same kind. They are not even punishable with the same maximum term of imprisonment. So that the charging of one or more persons of offences under section 380 and section 411 would amount to a misjoinder of charges, although there is a specific provision in section 236, Criminal Procedure Code, for charging a person in the alternative with regard to any one offence.

Although as a general rule one should presume prejudice to an accused from a misjoinder of charges, yet in the present case I feel that no prejudice could have resulted; because it was unnecessary for the Judge to charge the appellants in the alternative. He could have charged them under section 380 only, in which case it would still have been open to him to have convicted either or both of them under section 411. As a joint trial would have been permissible if the appellants had been charged under section 380, they cannot have suffered because the Sessions Judge added as an alternative charges under section 411.

The sentences are not excessive. The appeals are dismissed.

B.V.V. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Pallaprolu Krishnamacharlu and another .. *Appellants** (*Plffs.*)

v.

Pallaprolu Rangacharlu and others .. *Respondents* (*Defts.*). Krishnamacharlu *v.* Rangacharlu.

Madras Hindu Religious Endowments Act (II of 1927), section 63 (as amended in 1935)—Scope—Power of Board to appoint one of the trustees to be a managing trustee.

*Appeal No. 248 of 1940. 12th August, 1942.

Krishnamacharlu v. Rangacharlu.

Under section 63 of the Madras Hindu Religious Endowments Act, 1927, as amended in 1935, the Endowments Board has power to appoint any trustee whether hereditary or non-hereditary to be the managing trustee for a period. The Board will be exceeding their powers only if they purported to confer on one of the trustees all the powers of the general body of trustees.

Sitarama Das Bavaji v. *Hindu Religious Endowments Board, Madras,* (1937) 1 M.L.J. 475: I.L.R. 1937 Mad. 197, distinguished.

Appeal against the decree of the District Court of Nellore, dated 6th November, 1939 and passed in O.S. No. 5 of 1939.

K. Kuppuswami for Appellants.

P. V. Rajamannar and *M. Seshachalapathi* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal is concerned with a scheme framed by the Hindu Religious Endowments Board under section 63 of the Madras Hindu Religious Endowments Act, 1927, in respect of an excepted temple known as the Sri Udayavarla Sannadhi which is situate in a suburb of Nellore. The Board decided that there should be two trustees in addition to the four hereditary trustees and in clause (3) of the scheme the Board took power to appoint one of the trustees as the managing trustee for such period as it might deem fit not exceeding three years. The appellants objected to this provision and filed a suit in the District Court of Nellore under section 63 (4) of the Act. The District Judge decided that the Board had power to make such a provision and held it to be unobjectionable. The appeal is from that decision.

In support of his contention that the Board had no power to provide that one of the trustees shall be appointed as a managing trustee, the learned advocate for the appellants has referred to the decision in *Sitarama Das Bavaji* v. *Hindu Religious Endowments Board, Madras.*[1] That was a decision under section 63 before it was amended in 1935. The section as amended provides that the Board may, in settling a scheme, make provision for the fixing of the number of non-hereditary trustees, the appointment of a new trustee or trustees in addition to the existing trustee or trustees and "associating one or more persons with the trustee or trustees or constituting a separate body for the purpose of participating or assisting in the whole or any part of the administration of the endowment connected with such math or temple." Further the Board may define the powers and duties of the trustee or trustees.

We consider that under the section as it now stands, the Board has power to appoint any trustee whether hereditary or non-hereditary to be the managing trustee for a period. Of course if the Board purported to confer on one of the trustees all the powers of the general body of trustees that would no doubt be exceeding their powers. But the scheme framed in this case does not take away the powers of the general body of trustees.

As we agree with the District Judge, the appeal will be dismissed with costs.

K.S. ——— *Appeal dismissed.*

1. (1937) 1 M.L.J. 475; I.L.R. 1937 Mad. 197.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Kalyanasundaram Aiyar .. *Appellant** (*Petitioner*)

v.

Chinna Goundan and others .. *Respondents* (*Respts.*).

Kalyanasundaram Aiyar *v.* Chinna Goundan.

Madras Estates Land Act (I of 1908), section 6 (1) and (2) and Madras Estates Land (Amendment) Act (VIII of 1934), section 127—Person claiming both melwaram and kudiwaram rights in lands—Final decree upholding claim passed after 1st November, 1933—Execution of for possession —Whether entitled.

Where a landholder (an inamdar) claiming both melwaram and kudiwaram rights in the suit lands got a final decree upholding the claim on the 26th January, 1934, and he sought in execution of his decree an order for possession of the lands from the respondents who were admittedly on the land on 30th June, 1934.

Held, that there was nothing in section 127 [of the Estates Land (Amendment) Act, 1934], which could override anything said in Expl. (2) to section 6 of the Estates Land Act. That explanation was inserted at a later date by the Madras Estates Land (Third Amendment) Act (XVIII of 1936), and the amendments made by that Act finally settled the rights of parties. The landholder not having obtained a final decree till after the 1st November, 1933, his case does not come within the proviso to sub-section (2) of section 127 [of Act VIII of 1934].

Appeal under clause 15 of the Letters Patent against the order of the High Court (King, J.), dated 23rd August, 1940 and made in A.A.A.O. No. 86 of 1939 preferred to the High Court against the order of the District Court of Salem, in A.S. No. 94 of 1938 preferred against the order of the Court of the District Munsiff of Sankaridrug at Salem in E.P. No. 652 of 1937 in O.S. No. 250 of 1916.

A. Srirangachariar for Appellant.

M. Krishna Bharathi and *N. Somasundaram* for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant obtained a decree against the respondents declaring that he held both the melwaram and the kudiwaram rights in certain land then in the occupation of the respondents. This decree became final on the 26th January, 1934, as the result of the decision of this Court in L.P.A. No. 12 of 1931. On the 22nd January, 1937, the appellant filed in the Court of the District Munsiff of Sankaridrug at Salem an application for an order in execution of his decree. The District Munsiff held that by reason of section 6 of the Madras Estates Land Act, as it now stands, the application for possession of the property did not lie. This decision was challenged in an appeal to the District Judge, who reversed the decision of the District Munsiff. The respondents then appealed to this Court. The appeal was heard by King, J., who restored the judgment of the District Munsiff. This appeal is from the judgment of King, J., under clause 15 of the Letters Patent.

On behalf of the appellant it is conceded that if the question is governed merely by section 6 of the Madras Estates Land Act the appellant is not entitled to ask for possession of the property.

*L.P.A. No. 4 of 1941. 17th September, 1942.

Kalyana-sundaram Aiyar *v.* Chinna Goundan.

Leach, C.J.

It is, however, contended that by reason of the provisions of section 127* an application for possession does lie.

Sub-section (1) of section 6 states that subject to the provisions of the Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land situated in the estate shall have a permanent right of occupancy in his holding. Three explanations follow. Only two need to be considered. The first explanation is to the effect that for the purposes of sub-section (1) the expression "every ryot now in possession" shall include every person who, having held land as a ryot, continues in possession at the commencement of the Act. Explanation (2) states that the expressions "now" and "commencement of the Act" shall be construed as meaning the 30th day of June, 1934. The respondents were admittedly in possession on the 30th June, 1934.

Section 127 was introduced by the Madras Estates Land (Amendment) Act, 1934 and reads as follows:

"(1) Subject to the provisions of sub-section (2) nothing in this Act or in any repeal or amendment effected thereby shall affect any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act under a decree or order of a competent Court.

(2) No tenant in possession on the first day of November, 1933, of any land in an inam village, not being an estate within the meaning of sub-clause (*d*) of clause 2 of section 3 of the said Act as amended by this Act, or admitted by the inamdar to possession of any such land subsequent to the said date, shall be liable to be ejected until the date of the commencement of the Madras Estates Land (Third Amendment) Act, 1936, and all proceedings in ejectment of any such tenant and all proceedings involving a decision whether or not the inamdar has the kudiwaram right in such land, shall be stayed until the date of the commencement of the Madras Estates Land (Third Amendment) Act, 1936:

Provided that nothing contained in this sub-section shall apply to any land the kudiwaram interest in which has been declared or recognised before the 1st day of November, 1933, to vest in the inamdar by a decree or order of a competent Court which has become final."

The Madras Estates Land (Third Amendment) Act, 1936, came into force on the 31st October, 1936. The learned advocate for the appellant says that as he had obtained a decree before this section was enacted he has the right to obtain possession. Here, however, the governing section is sub-section (2) because the land in suit is inam land. The first part of sub-section (2) merely provides for the stay of execution proceedings until the passing of the Madras Estates Land (Third Amendment) Act, 1936. The appellant does not come within the proviso to this sub-section because he had not obtained a final decree on the 1st November, 1933. His rights were not finally declared until the 26th January, 1934. We agree with the learned Judge that there is nothing in section 127 which overrides anything said in Explanation (2) to section 6. That explanation was inserted at a later date by the Madras Estates Land (Third Amendment) Act, 1936, and the amendments made by that Act finally settled the rights of the parties. The appeal will be dismissed with costs.

K.C. — *Appeal dismissed.*

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*The reference is to section 127 of Madras Act VIII of 1934 as subsequently amended.—*Ed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH, MR. JUSTICE LAKSHMANA RAO, MR. JUSTICE KRISHNASWAMI AYYANGAR, AND MR. JUSTICE PATANJALI SASTRI.

Chippagiri Nagireddi .. *Appellant** (*Plff.*)

v.

Venkadari Somappa .. *Respondent* (*Deft.*).

F.B. Nagireddi *v.* Somappa.

Promissory note executed by manager of a joint Hindu family—Decree on—When can be enforced in execution against other coparceners.

In a case in which the manager of a joint Hindu family, not the father, is sued on a negotiable instrument executed by him in his personal capacity and the decree contains no direction that it shall be executed out of family property, only the defendant can be called upon to satisfy the decree. A creditor has only himself to blame if he contents himself with suing on the instrument. He can, if he wishes, add a claim on the debt and join the other coparceners as defendants, or he can bring a separate suit against them on the debt.

Somappa v. Nagireddi, (1941) 2 M.L.J. 1050, reversed.

Veeraraghavamma v. *Samudrala*, (1885) I.L.R. 8 Mad. 208 and *Guruvappa* v. *Thimma*, (1887) I.L.R. 10 Mad. 316, reaffirmed and followed.

Sethuvayyan v. *Muthuswami*, (1888) I.L.R. 12 Mad. 325; *Subramanian Chettiar* v. *Sivaswami Chettiar*, (1927) 54 M.L.J. 278 and *Lakshmanan Chettiar* v. *Muthu Chelliah Goundan*, (1934) 68 M.L.J. 104, approved.

Observations in *Venkatanarayana* v. *Somaraju*, (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.), disapproved.

Appeal under clause 15 of the Letters Patent against the judgment[1] and order of the Honourable Mr. Justice Abdur Rahman, dated 20th February, 1941, and passed in S.A. No. 149 of 1938 preferred against the decree of the District Court of Bellary in A.S. No. 116 of 1936 preferred against the decree of the Court of the District Munsiff of Bellary in O.S. No. 172 of 1936.

P. Satyanarayana Rao and *K. Kuppuswami* for Appellant.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondent.

This appeal coming on for hearing, the Court (*The Chief Justice and Byers, J.*) made the following

ORDER OF REFERENCE TO A FULL BENCH.

9th April, 1942.

The Chief Justice.—This Letters Patent Appeal raises a very important question. Abdur Rahman, J., held that the case fell within *Venkatanarayana* v. *Somaraju.*[2] The learned advocate for the appellant says that the facts in the present case are different and that decision does not really apply. It is admittedly in conflict with the decisions of this Court in *Veeraraghavamma* v. *Samudrala*,[3] *Guruvappa* v. *Thimma*,[4] *Sethuvayyan* v. *Muthuswami*[5] and *Lakshma-*

*L.P.A. No. 32 of 1941. 6th October, 1942.

1. (1941) 2 M.L.J. 1050.
2. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).
3. (1885) I.L.R. 8 Mad. 208.
4. (1887) I.L.R. 10 Mad. 316. 5. (1888) I.L.R. 12 Mad. 325.

F.B.

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nan Chettiar v. *Muthu Chelliah Goundan.*[1] The judgments in *Sethuvayyan* v. *Muthuswami*[2] and *Lakshmanan Chettiar* v. *Muthu Chelliah Goundan*[1] were not referred to in the judgment in *Venkatanarayana* v. *Somaraju.*[3] The question is of considerable importance and it is necessary that there should be a final decision so far as this Court is concerned. With the consent of the learned advocates, the whole appeal will be placed before a Full Bench. Therefore the case will stand out of the list until a Full Bench has been constituted for the purpose of hearing it.

(This appeal coming on for hearing, in pursuance of the aforesaid Order of Reference, the Court delivered the following)

JUDGMENT.—One Linga Reddi and his nephew, the plaintiff in this case, were joint in estate. On the 24th July, 1930, Linga Reddi executed a promissory note for Rs. 400, in favour of one Bhimakka, who in 1932 instituted a suit to enforce payment. The payee obtained a decree and in execution proceedings attached immovable property belonging to the family. The property was sold by the Court and was purchased by the defendant, to whom a sale certificate was granted on the 27th November, 1933. When the defendant attempted to enter into possession he was obstructed by the plaintiff. Consequently the defendant applied to the Court for an order directing the removal of obstruction and on the 6th February, 1936, his application was granted. Thereupon the plaintiff filed the suit which has given rise to this appeal. He contended that as he was not a party to Bhimakka's suit his share in the property attached by the decree-holder was not liable to be sold. Although Linga Reddi was the manager of the family the suit had been filed against him personally and there was no suggestion in the pleadings or in the decree that the debt had been incurred for a family necessity. The defendant's reply was that as Linga Reddi was in fact the manager of the family, as the debt had been incurred by him for a family necessity and as the property had been sold without any reservation the interests both of Linga Reddi and his nephew therein had passed to him. It is common ground that the property was attached as the property of Linga Reddi and not as property belonging to the joint family.

The District Munsiff held that the plaintiff's claim was well founded and declared that he was entitled to be restored to possession of the property, subject to the defendant's right to obtain possession of Linga Reddi's share in a separate suit for partition. The District Judge concurred in the judgment of the District Munsiff and in doing so relied on the decision of this Court in *Lakshmanan Chettiar* v. *Muthu Chelliah Goundan.*[1] The defendant appealed to this Court and Abdur Rahman, J., held that the interests of Linga Reddi and his nephew in the property in suit had passed to the defendant. The learned Judge

1. (1934) 68 M.L.J. 104.
2. (1888) I.L.R. 12 Mad. 325.
3. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).

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considered that the case fell within the decision of the Full Bench which decided *Venkatanarayana* v. *Somaraju*,[1] where the opinion was expressed that earlier decisions of this Court which were in the plaintiff's favour had been overruled by the Privy Council. The present appeal is under the Letters Patent from the judgment of Abdur Rahman, J.

The decisions of this Court which preceded *Venkatanarayana* v. *Somaraju*[1] and in the first place call for examination are *Veeraraghavamma* v. *Samudrala*,[2] *Guruvappa* v. *Thimma*,[3] *Sethuvayyan* v. *Muthuswami*,[4] *Subramanian Chettiar* v. *Sivaswami Chettiar*[5] and *Lakshmanan Chettiar* v. *Muthu Chelliah Goundan*.[6]

Veeraraghavamma v. *Samudrala*[2] was decided by Turner, C. J. and Muttuswami Aiyar, J. There a joint family consisted of two brothers, the younger of whom was a minor. A creditor brought a suit against the elder brother on a promissory note executed by him, and having obtained judgment attached property belonging to the family. The promissory note was executed by the elder brother in renewal of one executed by the father. The elder brother was not sued as the manager of the family and the decree was not drawn up as a decree to be executed against him in that character or to be satisfied out of family property. In the words of Turner, C.J., for aught that appeared on the face of the decree, the relief was awarded to the plaintiff against the defendant as for a purely personal liability. The younger brother brought a suit to set aside the attachment and the Court held that he was entitled under the circumstances to have it removed. The Court considered the decision of the Privy Council in *Bissessur Lall Sahoo* v. *Maharaja Luchmessur Singh*[7] but held that it did not apply.

In *Guruvappa* v. *Thimma*[3] an undivided family consisted of three brothers. The eldest brother mortgaged part of the family property by way of conditional sale to secure a loan. The mortgagee sued the mortgagor personally for the amount due. The mortgagor admitted the mortgage and said that he would surrender the property in discharge of the decree. Accordingly a decree was passed against him on this basis. When the mortgagee came to take possession of the property, the other brothers objected. It was held that as the decree had not been passed against the joint family or its representative and did not describe the property which had been directed to be delivered to the plaintiff by way of absolute sale to be family property, it could not be executed against such property. Here again the Court held that *Bissessur Lal Sahoo* v. *Maharaja Luchmessur Singh*[7] did not apply.

1. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).
2. (1885) I.L.R. 8 Mad. 208.
3. (1887) I.L.R. 10 Mad. 316.
4. (1888) I.L.R. 12 Mad. 325.
5. (1927) 54 M.L.J. 278.
6. (1934) 68 M.L.J. 104.
7. (1879) L.R. 6 I.A. 233: 5 C.L.R. 477 (P.C.).

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The same principle was applied in *Sethuvayyan* v. *Muthuswami.*[1] In the last mentioned case, the Court considered whether the judgment of the Privy Council in *Daulat Ram* v. *Mehr Chand*[2] had bearing and it was held that it had not. We shall consider later on the judgment in *Daulat Ram* v. *Mehr Chand,*[2] but in passing it may be mentioned that this was one of the cases on which the Full Bench relied in *Venkatanarayana* v. *Somaraju.*[3]

Veeraraghavamma v. *Samudrala,*[4] *Guruvappa* v. *Thimma*[5] and *Sethuvayyan* v. *Muthuswami*[1] were all Bench decisions. Although he did not refer to them, Srinivasa Aiyangar, J., applied the same principle in *Subramanian Chettiar* v. *Sivaswami Chettiar,*[6] where the joint family consisted of two brothers, and it was applied by Varadachariar and Burn, JJ., in *Lakshmanan Chettiar* v. *Muthu Chelliah Goundan,*[7] where a younger brother objected to his share in the family property being sold in execution of a decree passed against his elder brother in respect of a promissory note executed by him. In delivering the judgment of the Court, Varadachariar, J., pointed out that where a suit is instituted on a promissory note, it is *prima facie* a personal claim.

This brings us to the consideration of the judgment of the Full Bench in *Venkatanarayana* v. *Somaraju.*[3] The Bench consisted of Venkatasubba Rao, Cornish and Venkataramana Rao, JJ. Venkatasubba Rao and Venkataramana Rao, JJ., held that when a suit has reference to property of the family and the defendant is either the father or the eldest member, it must be presumed that he was sued as the representative of his family. It was not necessary to describe him as such in the pleadings, nor was it necessary for the decree to be against him specifically as such in order to pass the whole interest in the property. Cornish, J., based his judgment on section 50 of the Code of Civil Procedure. An examination of the facts of that case is not called for, nor is it necessary to consider whether the decision was right on the facts. We will assume that it was. What the Court is really concerned with is a statement in the judgment of Venkatasubba Rao, J., which says that the decision in *Krishna Prasad* v. *Harnarain Singh*[8] renders obsolete the decisions of this Court in *Veeraraghavamma* v. *Samudrala*[4] and *Guruvappa* v. *Thimma.*[5] If it does, then it renders obsolete the later decisions of this Court to which reference has been made. In the course of his judgment, the learned Judge also mentioned *Daulat Ram* v. *Mehr Chand,*[2] *Sheo Shankar Ram* v. *Jaddo Kunwar*[9] and *Lingangowda* v. *Basangowda*[10] and it would appear that in making the state-

1. (1888) I.L.R. 12 Mad. 325.
2. (1887) L.R. 14 I.A. 187: I.L.R. 15 Cal. 70 (P.C.).
3. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).
4. (1885) I.L.R. 8 Mad. 208.
5. (1887) I.L.R. 10 Mad. 316.
6. (1927) 54 M.L.J. 278.
7. (1934) 68 M.L.J. 104.
8. (1911) 21 M.L.J. 378: L.R. 38 I.A. 45: I.L.R. 33 All. 272 (P.C.).
9. (1914) L.R. 41 I.A. 216: I.L.R. 36 All. 383 (P.C.).
10. (1927) 52 M.L.J. 472: L.R. 54 I.A. 122: I.L.R. 51 Bom. 450 (P.C.).

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ment that *Veeraraghavamma* v. *Samudrala*[1] and *Guruvappa* v. *Thimma*[2] had been overruled, the learned Judge had in mind these other decisions of the Judicial Committee as well and therefore it is necessary to examine them all. It may be pointed out that Venkatasubba Rao, J., did not refer to any of the decisions of this Court later than that of *Guruvappa* v. *Thimma.*[2]

In *Daulat Ram* v. *Mehr Chand*[3] the essential facts were these. The managing members of a joint trading family mortgaged the family estate in order to discharge a debt due by the business. The mortgagee sued the mortgagors upon the mortgage and having obtained a decree he purchased the property at the Court auction. When he applied for possession the other members of the family objected. This resulted in the mortgagee bringing a suit for a declaration that the interests of the other members of the family had also been validly mortgaged to him and that as the result of his purchase he had obtained an absolute right to the whole of the property. On this basis he asked for a decree for possession. The defendants were the other members of the family and they averred that as they were not parties to the mortgage suit the decree passed therein did not affect their interests. At the trial the defendants rested their defence solely on the ground that they had not been made parties to the mortgage suit. The Privy Council agreed with the Courts below that the mortgagors were the managers of an ancestral business belonging to a family of which the defendants, who were minors when the mortgage was effected, were members, and that the mortgage was necessarily entered into in order to pay the debts of the business. Consequently there was a valid mortgage of the entire property and it might also be assumed that the property brought to sale was the whole of the mortgaged property, and not merely the rights of the judgment-debtors therein. These assumptions were drawn because the plaintiff had proposed to lead the necessary evidence, but he was not allowed to do so because the defendants were content to rely on the fact that they had not been made parties to the suit. Before the Privy Council the defendants sought a remand of the case on the question whether the mortgage had in fact been executed for the purpose of meeting debts due by the family business, but the Judicial Committee refused a remand because the defendants had stood upon the ground that they had not been made parties to the previous suit and objected to have the evidence gone into at the proper time.

In the first of the two Allahabad cases decided by the Privy Council, *Krishna Prasad* v. *Harnarain Singh*[4] a joint family carried on a money-lending business. There were three managing members who were entrusted with, and regularly exercised, powers to do everything necessary to carry on the business. The managing members lent money to the defendants for the purpose of the family business and there was a settlement of accounts. The managing members instituted a suit to recover from the defendants

1. (1885) I.L.R. 8 Mad. 208.
2. (1887) I.L.R. 10 Mad. 316.
3. (1887) L.R. 14 I.A. 187: I.L.R. 15 Cal. 70 (P.C.).
4. (1911) 21 M.L.J. 378: L.R. 38 I.A. 45: I.L.R. 33 All. 272 (P.C.).

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the money which they owed, and the objection was taken by the defendants that the suit was not properly constituted, because the other members of the family had not been joined as parties. In order to remove this objection, although not agreeing with its validity, the managing members asked leave to add the other members of the family as plaintiffs. Leave was accordingly granted and the other members of the family were added as plaintiffs, but after the period of limitation for the suit had expired. The consequence was that the defendants contended that the whole suit was time barred. The Privy Council held that the suit as originally brought was properly constituted because the non-managing members of the family were not necessary parties and therefore the law of limitation did not apply.

The decision in the second of the appeals from the Allahabad High Court, *Sheo Sankar Ram* v. *Jaddo Kunwar*[1] was also given in a mortgage suit. The plaintiffs sued to redeem a mortgage after foreclosure on the ground that they had not been made parties to the mortgage suit. It was held that in the mortgage suit they were properly and effectively represented by the managing members of the joint family of which the plaintiffs were members. Their Lordships saw no reason to dissent from the Indian decisions that there were occasions, including foreclosure actions, when the manager of a joint Hindu family so effectively represented all the other members of the family that the whole family was bound.

In *Lingangowda* v. *Basangowda*,[2] the decision of the Privy Council was based on the doctrine of *res judicata*. It was held that a decree obtained against the managing member of a joint family was binding upon minor members of the family under section 11, Expl. 6, Civil Procedure Code, 1908, if it appeared to the Court that the manager was acting in the first suit on behalf of the minors in their interests. There the plaintiff in the previous suit was acting on behalf of himself and his minor children and was attempting to exclude a collateral branch from a share of the family property. If he had succeeded, the judgment would have enured to the benefit of the children, but as he had failed they had to take the consequences.

None of these four judgments of the Judicial Committee has bearing on the case before us. In each one of them, the facts are widely different and we fail to understand what prompted Venkatasubba Rao, J., to say that the judgments in *Veeraraghavamma* v. *Samudrala*[3] and *Guruvappa* v. *Thimma*,[4] must be regarded as obsolete because of these decisions. He did not adduce any reason of his own for dissenting from them and we can see none.

In *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*,[5] it was pointed out that it is a fundamental principle of the law relating to negotiable instruments that no one whose name does not

1. (1914) L.R. 41 I.A. 216: I.L.R. 36 All. 383 (P.C.).
2. (1927) 52 M.L.J. 472: L.R. 54 I.A. 122: I.L.R. 51 Bom. 450 (P.C.).
3. (1885) I.L.R. 8 Mad. 208.
4. (1887) I.L.R. 10 Mad. 316.
5. (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568 (F.B.).

appear on the instrument can be held liable on it, and there are other cases in which this has been emphasised. We agree with the statement of Varadachariar, J., in *Lakshmanan Chettiar* v. *Muthu Chelliah Goundan*[1] that where a suit is instituted on a promissory note it is *prima facie* a personal claim. Where it is a personal claim, the defendant alone is liable to satisfy the decree, unless it directs that it is to be paid out of family property, which is not the case here. We are not concerned with the application of the pious obligation rule in execution proceedings, because the manager of this family was not the father. We are only concerned with a case in which the manager of a joint family, not the father, is sued on a negotiable instrument executed by him in his personal capacity and the decree contains no direction that it shall be executed out of family property. This was the position in *Veeraraghavamma* v. *Samudrala*,[2] *Guruvappa* v. *Thimma*,[3] *Sethuvayyan* v. *Muthuswami*,[4] *Subramanian Chettiar* v. *Sivaswami Chettiar*[5] and *Lakshmanan Chettiar* v. *Muthu Chelliah Goundan*[1] and we consider that they were rightly decided. Each case must depend on its own facts but where the facts are similar to the facts in those cases, as they are in the present case, only the defendant can be called upon to satisfy the decree. A creditor has only himself to blame if he contents himself with suing on the instrument. He can if he wishes add a claim on the debt and join the other coparceners as defendants, or he can bring a separate suit against them on the debt.

We are aware that this question has been debated in other High Courts of India and the decisions show a conflict of opinion, but we find no reason in the judgments which run counter to doubt the wisdom of the series of decisions of this Court which preceded the judgment of Venkatasubba Rao, J., in the Full Bench case of 1937. It may perhaps be mentioned that in *Lakshman Venkatesh* v. *Kasinath*[6] the Bombay High Court took the same view as this Court did in *Veeraraghavamma* v. *Samudrala*[2] that it changed its opinion in *Hari Vittal* v. *Jairam Vittal*[7] and that in *Laxman Nilkant* v. *Vinayak Keshav*,[8] it gave indication of a return to the former opinion. In the last mentioned case Scott, C. J., expressly stated that *Daulat Ram* v. *Mehr Chand*[9] did not appear to him to affect in any way the authority of *Lakshman Venkatesh* v. *Kasinath*.[6]

Holding as we do that there is no justification for the statement of Venkatasubba Rao, J., in *Venkatanarayana* v. *Somaraju*[10] that *Veeraraghavamma* v. *Samudrala*[2] and *Guruvappa* v. *Thimma*[3] have been rendered obsolete by decisions of the Privy Council and

1. (1934) 68 M.L.J. 104.
2. (1885) I.L.R. 8 Mad. 208.
3. (1887) I.L.R. 10 Mad. 316.
4. (1888) I.L.R. 12 Mad. 325.
5. (1927) 54 M.L.J. 278.
6. (1886) I.L.R. 11 Bom. 700.
7. (1890) I.L.R. 14 Bom. 597.
8. (1915) I.L.R. 40 Bom. 329.
9. (1887) L.R. 14 I.A. 187: I.L.R. 15 Cal. 70 (P.C.).
10. (1937) 2 M.L.J. 251: I.L.R. (1937) Mad. 880 (F.B.).

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as we consider that these two cases and *Sethuvayyan* v. *Muthuswami*,[1] *Subramaniam Chettiar* v. *Sivaswami Chettiar*[2] and *Lakshmanan Chettiar* v. *Muthu Chelliah Goundan*[3] were rightly decided, the appeal will be allowed and the decree of the District Judge restored with costs in the second appeal and in this appeal.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

V. S. Ramanuja Chariar .. *Appellant** (*Plff.*)

v.

Veena. Avanna. Mana. Vatapathra Sayee Thathachariar .. *Respondent* (*Deft.*).

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Civil Procedure Code (V of 1908), Schedule II, paragraph 20—Reference to private arbitration—Procedure—Piecemeal decisions—Nature of award whether final—Validity of.

If in a partition dispute a reference was made of the whole matter to the arbitrator with directions to make an award, the arbitrator would not be empowered to make a series of separate awards each dealing with one branch of the dispute, as on the making of an award he would be *functus officio* and would have no power to do anything further. But an arbitrator dealing with a complicated partition dispute will not be debarred from taking up an enquiry piecemeal, classifying the evidence according to subject-matter more or less under issues just as a Court would do and arriving at tentative conclusions on each section of the case always provided that he does not make anything in the nature of an award in writing until the whole matter is decided.

Where in a partition dispute referred to an arbitrator under paragraph 20 of Schedule II, Civil Procedure Code, the arbitrator had firstly to ascertain the properties available for division before he proceeded to decide how they should be divided and the apportionment of the debts frequently depended upon the apportionment of the lands and hence the arbitration could not but be proceeding piecemeal,

Held, that there was nothing wrong in such procedure of the arbitrator unless he can be deemed to have made a final and formal award at any of the stages of the arbitration proceedings. Hence the procedure in deciding the various sections of the enquiry piecemeal and summing them up in one final award, did not amount to the giving of several awards so as to render his decision invalid.

Winter v. *Munton*, (1818) C.P. 2 Moore 723, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin, dated 7th November, 1939 and passed in O.S. No. 3 of 1935.

K. R. Rama Aiyar for Appellant.

S. Narayana Aiyangar for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The appellant was the plaintiff in a suit under paragraph 20 of Schedule II, Civil Procedure Code, to enforce an award in a matter referred to arbitration without the intervention of the Court. The plaintiff is the younger brother of the defendant and it was his case that the division of their joint family pro-

1. (1888) I.L.R. 12 Mad. 325.
2. (1927) 54 M.L.J. 278.
3. (1934) 68 M.L.J. 104.

*Appeal No. 244 of 1940. 24th August, 1942.

perties was by consent of parties referred to the arbitration of their brother-in-law, P.W. 4, who passed an award on 21st November, 1934, which award the defendant had wrongfully refused to accept. The defendant raised many contentions, most of which have been held to be unfounded in fact. He denied the truth of the reference to arbitration, setting up another reference of a completely different character, denied the existence of a joint family at the time when the reference was made and made various allegations suggesting partiality on the part of the arbitrator. The trial Court has found that the muchilika Ex. A, which contains the reference to arbitration is true, that the other muchilika Ex. LIV put forward by the defendant is false and that the plaintiff's version of the facts is substantially the truth. It is not now contended that these findings are incorrect. The learned Subordinate Judge has, however, dismissed the suit on the ground of various legal defects in the proceedings of the arbitrator.

The reference to arbitration is contained in Ex. A, dated 3rd September, 1933, the material portion of which runs as follows:

"Since certain disputes arose in the matter of effecting a division, into two parts, of the nanja, punja, house and other immovable properties belonging to our family and the money-lending items due to the family through individual No. 1, out of us, and the debts payable, it was found impossible to make a division. In these circumstances, we requested you to act as mediator in regard to the aforesaid division and as to how we should act regarding the same and agreeing that both of us would act according to the decision passed by you and that we would execute documents as per the award that you may pass in that behalf, we have executed this muchilika in your favour. Therefore both of us shall act according to the decision that you would make in the matter and conduct ourselves accordingly."

It will be noticed that this reference contemplates the passing of an award by the arbitrator and the execution of documents by the parties in accordance with the terms of that award. Apart from these provisions the reference does not indicate in any way how the arbitrator shall proceed. On 20th April, 1934, the parties met the arbitrator at Srivilliputtur and a decision was reached, apparently by consent, as to the way in which the immovable properties in the neighbourhood of Srivilliputtur should be divided. Nothing appears to have been drawn up in writing on this date and it is clear that the money-lending capital still remained to be divided. On 1st May 1934, the plaintiff took a lease from his sister Janaki of the lands settled on her under a deed of 1924, Ex. E. This action of the plaintiff provoked the defendant and on the 2nd May, under Ex. LV he executed a deed in which he purported to cancel the settlement Ex. E. On the next day, 3rd May 1934, a registered notice Ex. XXIX was issued by the arbitrator to the parties reciting the reference to arbitration, the inspection of the Srivilliputtur properties and the decision of the 20th April regarding the immovable properties and the admitted debts. He forwarded a draft partition agreement which makes a division of the bulk of the immovable properties and the debts due by the two brothers. In the same

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notice the brothers are required to appear before the arbitrator on 5th June, 1934, to produce evidence of debts alleged to have been incurred individually for family purposes and of the amounts due to the family in respect of money-lending dealings. On 7th May, 1934, the defendant sent a notice, Ex. J, to the arbitrator in which he denied having executed any such reference as is mentioned in Ex. XXIX, denied having consented to the division of the immovables and referred to certain Koilpatti lands and other properties as having been got under a will and asserted that the family had been divided ever since 1904. The effect of Ex. J is a denial by the defendant of the whole basis of the arbitration and an assertion that there were no joint family properties capable of division. The Koilpatti lands referred to are certain dry lands of small value which appear to have been omitted from the draft partition deed attached to Ex. XXIX by oversight. After the exchange of further notices between the parties, the arbitrator on 15th June, 1934, sent a further notice Ex. K-1 to the defendant stating that the defendant had not appeared on the date fixed for hearing, but the plaintiff had given a statement of his case and had filed documents and that the matter was reposted to 25th June for the examination of the defendant and that in case of default a decision would be made *ex parte*. On the following day a further notice Ex. K-2 was sent intimating that the Koilpatti lands had been divided into two halves, the northern half being allotted to the plaintiff and that the decision with reference to the money-lending transactions was adjourned to 10th July. There is no suggestion that the division of the Koilpatti lands was unfair and the defence claim to these lands as acquired under a will having been found to be untrue, it is evident that the arbitrator, probably reminded of these lands by the defendant's notice, Ex. J, was merely adding to his previous division of the family properties what had been omitted by oversight.

On the 11th July, 1934, the arbitrator sent a further notice Ex. K-3 to the defendant. It refers to the *muchilika* of 3rd September, 1933, and states that all the properties and debts having been divided "as regards the money-lending items due to the family in your name, it has been decided that you should make good Rs. 4,000 to the said V. S. Ramanujachariar '(plaintiff)' on the liability of your share of family properties and that an award has been passed on this date containing other particulars." The English word "award" is used in this notice. There is no suggestion that any written award was in fact passed at this time. But the arbitrator appears to have orally announced his decision regarding the money-lending assets. With reference to these assets the evidence is that all the documents were in the possession of the defendant who was refusing to co-operate with the arbitrator. The plaintiff was able to produce only certain accounts said to have been signed by the defendant showing the financial position of the family in 1909 and 1910 and an abstract of the money-lending documents as they stood in 1913. On the basis of these materials the arbitrator appears to have made a rough calculation of the amount of the money-lending capital which must be presumed to be comprised in the documents sup-

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pressed by the defendant and as he was unable to deal with the actual documents he awarded to the plaintiff a half share of the estimated value of these assets.

Up to this date we find that the arbitrator has communicated to the defendant three piecemeal decisions regarding the partition of various items of the family property. Firstly, there is the division of the bulk of the immovables and the admitted debts on 20th April communicated with the notice Ex. XXIX of the 3rd May. Secondly, there is the division of the Koilpatti lands communicated under Ex. K-2 of the 26th June, and thirdly, there is the decision regarding the outstandings communicated under Ex. K-3 on the 11th July with this reference to an oral award. Nothing more of importance seems to have happened until the 21st November, 1934, when the arbitrator passed a formal award, Ex. D, which summarises the whole of his proceedings and his various decisions including an observation that neither party has adduced evidence regarding his individual borrowings for the family and that each must therefore be held responsible for his own debts. It is this award which the Court is asked to enforce.

It has been rejected by the lower Court on various grounds. Firstly, the learned Subordinate Judge finds that the award is not in conformity with the terms of reference, because instead of dividing the outstandings into two portions they are allotted *en bloc* to the share of the defendant and he is directed to pay a lump sum of Rs. 4,000 to the plaintiff. It is difficult to see how the award can be held invalid on these grounds. It was the duty of the arbitrator to divide these outstandings as fairly as possible having regard to the materials placed before him. All the essential documents were in the custody of the defendant who deliberately withheld them from the arbitrator's enquiry. The only materials available to the arbitrator were these old accounts furnished by the plaintiff on the basis of which he was able to make a rough estimate of the approximate value of the money-lending capital. It was impossible for him on these materials to divide the individual debts; for he did not know what these debts were, from whom they were due and how much was outstanding under each. The absence of this information was entirely due to the default of the defendant. It seems to us that the arbitrator has done the only thing which he could possibly have done in these circumstances and has acted on inferences which are the proper legal inferences to draw having regard to the conduct of the defendant. He has in fact done that which a Court would have done in similar circumstances on the same materials and has made the best possible division of the outstandings which was practicable. It would in our opinion be most improper to allow the defendant to defeat the arbitration by the simple process of suppressing all the evidence at his disposal.

A mere serious challenge to the validity of the award and in fact the only substantial challenge made actually in the defendant's written statement is based on the contention that the arbitrator has made more than one award and that therefore the arbitration cannot be upheld. The learned Subordinate Judge

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finds that there were three awards, one on the 20th April, embodied in Ex. XXIX of 3rd May, another relating to the Koilpatti lands on the 26th June, and a third relating to the outstandings on the 11th July, preceding the final award which, is sought to be enforced. It is no doubt the law that an arbitrator must make a single award unless the terms of reference permit him to make a series of awards. The case commonly referred to as authority, for this doctrine is *Winter* v. *Munton*.[1] That was a case in which Winter filed two suits, one against Munton and the other against White. The suits were closely interconnected and a reference to arbitration was first made in Munton's case. Subsequently the Court ordered that White should be made a party to the arbitration between Winter and Munton and that the award should be binding and effectual upon all three as if White had been a party to the original order and that all matters in difference between the three parties jointly and severally should be referred to the determination of the same arbitrator, who should make an award thereof and that the costs in both suits should abide by the award. Instead of making a single award consolidating the two connected disputes the arbitrator made two separate awards, one of the liabilities as between Winter and Munton and the other of the liabilities as between Winter and White. It was held that there was no award determining all the matters in difference between all the parties and that the arbitrator had no power to separate the two disputes and that his award was defective also in that it did not decide whether there were any liabilities between the two defendants White and Munton.

It seems clear on the authority of this case and other similar decisions that if in a partition dispute a reference is made of the whole matter to the arbitrator with directions to make an award, the arbitrator would not be empowered to make a series of separate awards each dealing with one branch of the dispute, and this is reasonable, for on the making of an award, the arbitrator would be *functus officio* and would have no power to do anything further. Moreover, the first award which he made would be defective in that it did not cover the whole of the matters referred. We do not, however, consider that it is the law that an arbitrator dealing with a complicated partition dispute is debarred from taking up the enquiry piecemeal, classifying the evidence according to the subject-matter more or less under issues just as a Court would do and arriving at tentative conclusions on each section of the case, always provided that he does not make anything in the nature of an award in writing until the whole matter is decided. In a partition enquiry the arbitrator must decide firstly what are the properties available for division, before he proceeds to decide how those properties should be divided. The apportionment of the debts will not infrequently depend upon the apportionment of the lands and it is to our minds almost inevitable that an arbitration of this kind should proceed piecemeal. It follows that there is nothing wrong in the procedure of the

1. (1818) C.P. 2 Moore 723.

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arbitrator in this case unless he can be deemed to have made a final and formal award at any of the stages before he passed his award, Ex. D, which is sought to be enforced.

When we examine these various stages it does not appear that there was in fact or in intention any final or formal award prior to Ex. D. The notice of 3rd May, Ex. XXIX, enclosing the draft partition is in terms nothing more than a notice calling for the consent of the parties to the draft agreement and requiring them to appear at a future date for the decision of the remaining matters. It is true that the notice speaks of a decision regarding the lands, the word "*faisal*" being used. But there is not, in our opinion, anything which can properly be regarded as a final award. The notice of 26th June about the Koilpatti lands is a mere *addendum* to the decision regarding the immovable properties. Had there been a final award on 3rd May, presumably the arbitrator would not have had the power to revise that award or add to it. But we do not consider that there was any final award embodied in Ex. XXIX. Much emphasis has been placed upon the use of the word "award" in Ex. K-3 which says that, "an award has been passed on this date containing other particulars." No such award appears to have been reduced to writing. The most that there seems to have been is an oral communication of the decision of the arbitrator on the various matters submitted to him. This decision must have been substantially the decision embodied in the formal award, Ex. D, passed some four months later. It does not appear that the formal award, Ex. D, adds anything to the decisions already communicated in the earlier notices, except perhaps the finding that in the absence of evidence each party must be liable for the debts standing in his own name. We are not prepared to hold on the materials available that there was any final and formal award at the time of Ex. K-3. There was probably an indication given to the plaintiff of the nature of the arbitrator's findings. But this had necessarily to be reduced to a formal document signed by the arbitrator embodying the result of the arbitration as a whole and the only document of this nature is, in our opinion, Ex. D. We therefore hold that the award sought to be enforced is not invalid because of earlier awards in the same matter.

The learned Subordinate Judge finds that the award is also bad because the arbitrator has imported his personal knowledge into his decisions. We doubt very much whether as a matter of law an award can be invalidated merely because the arbitrator is personally acquainted with some of the facts upon which a decision is required. No doubt cases might arise in which the use by an arbitrator of his personal knowledge as a ground for rejecting the evidence put before him might amount to misconduct; but much must depend upon the nature of the arbitration and the relations between the arbitrator and the parties. When an arbitrator is apparently chosen for his personal knowledge of the questions in issue, it would be ridiculous to hold that the mere fact of his possessing such personal knowledge and examining the evidence in the light of that personal knowledge would amount to misconduct,

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So much has been held in *Chidambaram Chettiar* v. *Ayyappa Chettiar*.[1] In the present case the parties selected as the arbitrator their own sister's husband, a man intimately connected with the family and necessarily aware of its status and to some extent of its properties. The lower Court has criticised the arbitrator because he judged the truth of Ex. L-1 an account filed by the plaintiff showing the financial position of the family, with reference to his personal knowledge of one of the items mentioned in that account which was an assignment made in the presence of the arbitrator many years ago. Curiously enough, the other instance in which the arbitrator has been criticised under this heading is an instance in which the arbitrator believed the evidence of the plaintiff and did not attack that evidence by reference to a transaction alleged to be within the personal knowledge of the arbitrator. That is to say, in one instance the arbitrator is criticized for using his personal knowledge and in the other instance the real burden of the criticism is that he did not use his personal knowledge. It seems to us that when as in this case the arbitrator is chosen from the family circle he must necessarily make the enquiry in the light of his personal knowledge of the family and so long as he bases his enquiry on the materials placed before him read in the light of his knowledge of the family, we do not think that he can be held guilty of misconduct on that account.

The learned Subordinate Judge also comes to the conclusion that the arbitrator displayed partiality. The basis for this conclusion is the arbitrator's action in going on with the enquiry when the defendant repudiated the reference and accused him of bias, the action of the arbitrator in awarding a lump sum payment to the plaintiff instead of dividing the outstandings, the action of the arbitrator in pronouncing his award without notice to the parties and in passing his award at a place other than the place where the parties reside. It seems to us that in all these matters the conduct of the arbitrator was correct. It would have been most improper for him to abandon the arbitration merely because the defendant tried to resile from the reference and put forward false pleas as to its nature. The defendant having refused to appear before the arbitrator in response to repeated notices to produce his evidence, there was, in our opinion, no necessity whatever for the arbitrator to give him notice of the date on which he proposed to sign his award. Nor is there any obligation upon an arbitrator to pronounce his award in any particular place or in the presence of the parties.

Summing up the case, we have no doubt that the positive assertions of the defendant regarding the facts are almost entirely untrue, that the conduct of the arbitrator has not been marked by partiality and that his procedure in deciding the various sections of the enquiry piecemeal and summing them up in one final award, does not amount to the giving of several awards so as to render his decision invalid. The appeal is therefore allowed

1. (1934) 69 M.L.J. 558.

with costs throughout and there will be a decree in terms of the award, Ex. D. Ramanuja Chariar v. Thathachariar.

K.C. Appeal allowed. Wadsworth, J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Hindu Religious Endowments Board, Madras .. *Appellant** (*Deft.*)

v.

Angara Singaracharyulu and others .. *Respondents* (*Plffs.*).

H. R. E. Board, Madras v. Singaracharyulu.

Madras Hindu Religious Endowments Act (I of 1927), *section* 69 (1) *and* (2)—*Temple Committee ceasing to function—Duties taken over by Board—Expenses involved in the discharge of duties—Contribution from temple towards expenses—Board entitled to levy.*

Where a Temple Committee constituted under the Madras Hindu Religious Endowments Act, 1926, ceased to function in 1932, but its duties were performed by the Endowments Board itself, on the question whether in the circumstances, the Board was entitled to levy contributions under sub-section (2) of section 69 as well as under sub-section (1) of that section,

Held, that the Board was lawfully performing the Committee's duties in addition to its own and as expenses involved in carrying out the Committee's duties had to be met by the Board it was entitled to the contribution contemplated by sub-section (2) of section 69 in addition to the contribution under sub-section (1).

Appeals against the decrees of the Court of the Subordinate Judge of Amalapuram in A.S. No. 68 of 1937, etc., preferred against the decrees of the Court of the District Munsiff of Amalapuram in O.S. Nos. 64, etc., and of the Court of the District Munsiff of Razole in O.S. Nos. 262, etc., of 1936, respectively.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

T. M. Krishnaswami Aiyar for Respondents.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The East Godavari Temple Committee, which was constituted under the Madras Hindu Religious Endowments Act, 1926, ceased to function in the year 1932, since when, the duties of the Committee have been performed by the Hindu Religious Endowments Board. The question to be decided in these appeals is whether in the circumstances the Board is entitled to levy contributions under sub-section (2) of section 69 as well as under sub-section (1) of that section. The appeals arise out of separate suits filed by the respective trustees of five non-excepted temples in the East Godavari district. The plaintiffs denied that the properties out of which the Board sought to enforce payment of the contribution under sub-section (2) of section 69 belonged to the temples. They claimed that they belonged to them as the *archakas*. They also denied that the Board was entitled to levy contributions under sub-section (2) of section 69, even if the properties belonged to the temples.

The suits were filed in the Courts of the District Munsiff of Amalapuram and Razole. The District Munsiff found for the Board on all the issues raised. Appeals followed to the Subordinate Judge of Amalapuram. The Subordinate Judge agreed with

*S.A. Nos. 546 to 550 of 1939. 17th August, 1942.

H. R. E. Board, Madras v. Singara-charyulu.

Leach, C.J.

the District Munsiff except on the question whether the Board had the right to levy contributions under sub-section (2) of section 69. In his opinion the contributions contemplated by sub-section (2) ceased to be enforceable when the Committee ceased to function. The appeals are from this decision.

By virtue of section 18 of the Act the Board has general superintendence of all religious endowments in this Presidency. It may do all things which are reasonable and necessary to ensure that maths and temples are properly maintained and that all religious endowments are properly administered and duly appropriated to the purposes for which they were founded or exist. By section 20 the Provincial Government has power to direct the constitution of a Committee for a local area or a class or classes of institutions in a local area and it may abolish a Committee constituted by it. The duties which a Temple Committee has to perform are specified in sections 35, 39, 43 (2), 51, 53, 55, 56 and 60.

Sub-section (1) to section 69 states:

"Every math or temple and every specific endowment attached to a math or temple shall pay annually for meeting the expenses of the Board such contribution not exceeding one and a half per centum of its income as the Board may determine:

Provided that every notified temple other than an excepted temple, and every notified endowment other than an endowment attached to an excepted temple shall pay annually to the Board such contribution not exceeding three per centum of its income as the Board may determine."

Sub-section (2) says:—

"Every temple other than an excepted or notified temple and every specific endowment attached to a temple other than an excepted or notified temple shall pay annually for meeting the expenses of the committee such contribution not exceeding one and a half per centum of its income as the Committee may with the approval of the Board determine."

The contribution leviable under sub-section (1) is required to meet the expenses of the Board incurred in performing the duties imposed upon it by the Act. Sub-section (2) has been enacted in order that the Committee may have the funds to carry out its duties. The Board says that as it is now carrying out double duties, its own and those of the Committee, it is entitled to both contributions.

Section 60-A states:

"(1) Where for any local area or any class or classes of institutions in any local area, a committee has not been constituted or is not in existence, the Board and its President may, notwithstanding anything contained in this Act, exercise all or any of the powers and perform all or any of the duties of the Committee and its President respectively, until a Committee is constituted or comes into existence.

(2) The provisions of this Act relating to appeal from the orders of a Committee to the Board or the approval of the actions of a Committee by the Board shall not apply to the orders or actions of the Board acting under sub-section (1)."

Therefore the Board is lawfully performing the Committee's duties in addition to its own and as expense is involved in carrying out the Committee's duties, we consider that it is entitled to the contribution contemplated by sub-section (2) of section 69, in addition to the contribution under sub-section (1),

The appeals will be allowed with costs here and below in each case.

K.C. —— *Appeals allowed.*

H. R. E. Board, Madras *v.* Singaracharyulu.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

U. Ananthakrishna Baliga .. *Petitioner.**

Leach, C.J.

Ananthakrishna Baliga, *In re.*

Civil Procedure Code (V of 1908), Order 33, rule 1 and Order 44—If applicable to applications for review by defendants or respondents in appeal.

In an application by the respondent in a batch of appeals for review of the judgment in *forma pauperis,*

Held: There is nothing in Order 33 of the Civil Procedure Code, which can help a defendant in asking for the indulgence granted to persons who wish to file suits in *forma pauperis* except perhaps in cases where he (that is, the defendant) may be, for the purposes of the suit regarded as a plaintiff. The words of Order 33, rule 1, are unambiguous and cannot be construed so as to cover a defendant or a defence.

Doorgachurn Doss v. *Nittokilly Dossee,* (1880) I.L.R. 5 Cal. 819, not followed.

The Court possesses no powers to exempt a defendant or a respondent from paying the necessary court-fee, even temporarily when they are required to pay the same at the time when proceedings are initiated by them except perhaps when they really stand in the position of plaintiffs or appellants.

A petition for review cannot be regarded to be in the nature of a continuation of the suit at least up to the time that it is not granted.

There is no procedure which will entitle a Court to make an enquiry in regard to a respondent's *pauperism* after the appeal in regard to which he is making the application for review has been brought to a close.

Petition praying that in the circumstances stated in the affidavit filed in S.R. No. 8334 of 1942, the High Court will be pleased to excuse the delay in filing the review petitions against the judgment of the High Court in Appeals Nos. 259 to 262 of 1937, preferred against the decrees of the District Court of South Kanara in O.S. Nos. 14, 11, 15 and 16 of 1936, respectively.

P. G. Krishna Aiyar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Government.

The Court made the following

ORDER.—Four appeals were filed in this Court in the ordinary form. They were heard *ex parte* and accepted by a Division Bench composed of Venkataramana Rao, J. and myself on the 20th November, 1941, after arguments had been addressed to us by Mr. Sitarama Rao on behalf of the appellant. The petitioner, who was one of the respondents and who was by our judgment also held liable for the debts, presented four petitions for review in *forma pauperis* after the retirement of Venkataramana Rao, J. The first question to decide is whether these petitions are legally competent and the petitioner can be allowed to prosecute them as a pauper.

*C. M. P. Nos. 2026 to 2033 of 1942. 2nd October, 1942.

Anantha-krishna Baliga, *In re.*

Learned counsel for the petitioner contends in the first instance that although his application was not in terms covered either by Orders 33 or 44 of the Code of Civil Procedure yet it is possible for this Court to permit him to make an application for review in the same way as a defendant was allowed by Wilson, J., in *Doorgachurn Doss* v. *Nittokilly Dossee,*[1] to defend a suit in *forma pauperis.* His second contention is that if a Court has power to allow a suit initially filed with the necessary court-fee to be continued in *forma pauperis* as held in *Thomson* v. *Calcutta Tramway Company*[2] and *Neelikandi Moidin* v. *Kunhayissa,*[3] there is no reason why a petition for review should not be allowed to be filed on the same analogy particularly when a petition for review was nothing but a continuation of the suit and could legitimately take the place of a plaint filed under Order 33, Civil Procedure Code and of a memorandum of appeal under Order 44. Reliance was placed in this connection on certain observations of Gentle, J., in *Palani Gramani* v. *Manickammal,*[4] where in reading the provisions of Order 33, Civil Procedure Code, along with certain original side rules of this Court, the learned Judge took the view that applications for grant of probate or letters of administration could fall within the purview of Order 33 and the exemption from paying court-fee could be extended also to succession duty. My attention was also drawn in this connection to an unreported decision of Curgenven, J., referred to in Satyamurthi Aiyar's Court-Fees Act (1936 edition) at pages 465 and 466, where the learned Judge took the view that it was possible for an applicant who was a pauper to make an application for review in *forma pauperis* although he might not have preferred the appeal as a pauper.

The first contention advanced on behalf of the petitioner is based, as stated above, on the decision of Wilson, J., in *Doorgachurn Doss's case.*[1] There is nothing in Order 33 which can, in my view, help a defendant in asking for the indulgence granted to persons who wish to file suits in *forma pauperis* except perhaps in cases where he (*i.e.,* the defendant) may be, for the purposes of the suit, regarded as a plaintiff. The words in Order 33, rule 1 are unambiguous and cannot be construed so as to cover a defendant or a defence. The decision in *Doorgachurn Doss's case*[1] gives no reasons and is based on English Practice in Chancery which has no application to this country, where a plaintiff, unlike in England, is required to pay court-fee on his plaint. As for the second contention, the decisions in *Thomson's case,*[2] or *Neelikandi Moidin's case*[3] are, in my opinion, of no assistance in the present case. The decision in the first of these cases was given in conformity with what the learned Judge considered to be the practice of the Calcutta Court but in any case the decision was correct as pointed out by Varadachariar, J., in

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1. (1880) I.L.R. 5 Cal. 819.
2. (1893) I.L.R. 20 Cal. 319.
3. (1935) 43 L.W. 380.
4. (1937) 47 L.W. 731.

the latter case, as the provisions of Order 7, rule 11, Civil Procedure Code had "to be read consistently with the powers possessed by the Court under other provisions of the law" and as no useful purpose could be served "in insisting that the Court must reject the plaint in circumstances like those of the present case and insist upon the plaintiff filing a fresh petition." Neither of the reasons given by that learned Judge can have any application to the present case. The Court possesses no powers to exempt a defendant or a respondent from paying the necessary court-fee, even temporarily, when they are required to pay the same at the time when proceedings are initiated by them except perhaps, as suggested before when they really stand in the position of plaintiffs or appellants and can be brought in that category within the meaning of Orders 33 and 44, Civil Procedure Code. There is also no question of withholding any permission from the petitioner in this case so that he may start with the proceedings afresh and no consideration as to the waste of court-fee paid by him arises here as was present in the minds of the learned Judges who decided *Neelikandi Moidin* v. *Kunhayissa.*[1] A petition for review cannot be regarded to be in the nature of continuation of the suit at least up to the time that it is not granted and in the absence of any provisions of law, it does not seem to be possible to stretch the analogy of plaints or of memoranda of appeals to such applications. It is unnecessary in my opinion to examine the decision in *Palani Gramani* v. *Manickammal*[2] closely as that decision was given in a case where the Original Side Rules of this Court were applicable. These have no application to the present case and even if the terms of section 141, Civil Procedure Code, are taken into consideration there appears to be no justification for transforming a defendant-respondent into a plaintiff-appellant. The decision by Curgenven, J., is opposed to the decision in *Ma Nyein Yone* v. *P. D. Patel*,[3] cited by the learned Government Pleader (to whom I had, in view of the importance of the point involved in this case and as it was likely to form a precedent for the future, decided to issue notice) but it may be possible to support it by a liberal construction of the words "or other proceedings connected with the suit" used in Order 33, rule 8, Civil Procedure Code. This rule however can exempt a plaintiff only from paying such fees as are mentioned in that rule and cannot possibly be extended to a defendant. The question of the petitioner's pauperism has never been gone into while the suit or appeal was pending and there is no procedure which will entitle a Court to make an enquiry in regard to a respondent's pauperism after the appeal in regard to which he is making the application has been brought to a close.

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It was held by the Full Bench in the *Maharajah of Venkatagiri case*[4] that a power to consolidate suits or appeals may be, in the absence of anything in the Code of Civil Procedure or in any

1. (1935) 43 L.W. 380.
2. (1937) 47 L.W. 731.
3. (1929) I.L.R. 8 Rang. 423.
4. (1929) 58 M.L.J. 510: I.L.R. 53 Mad. 248 (F.B.).

Anantha-krishna Baliga, *In re.*

other enactment, exercised by a Court but that power cannot be "extended in a manner to conflict with the provisions of any enactment like the Court-Fees Act." Similarly, in the absence of anything in the Code of Civil Procedure or in any other enactments that would authorise me to admit an application for review on behalf of the respondent in *forma pauperis* it is not, having regard to section 4 of the Court-Fees Act, possible for me so to do. Even a temporary exemption from the payment of court-fee is after all in the nature of an indulgence granted and an exception made by the Legislature in favour of a pauper plaintiff or a pauper appellant and it is not easy to extend that exception to the petitioner in the present case.

Learned counsel for the petitioner wants me to give his client a month's time to enable him to pay the necessary court-fee on the application for review. The application for review was filed after the statutory period prescribed for the purpose. The petitioner has also applied for the delay to be excused but this application has not been granted. I did not take it into consideration as I was not satisfied that the petition for review was in order. Nor am I in a position to give any assurance to the petitioner now that his application would be necessarily granted even if he puts in the necessary court-fee. In any case since he wants time to put in the requisite court-fee, I would let him do so within a fortnight from to-day. If the court-fee is not paid within that time the petition for review would stand dismissed.

K.S. ——— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Mohamed Meera Sahib and others .. *Petitioners** (*Accused*).

Mohamed Meera Sahib. *In re.*

Criminal Procedure Code (V of 1898), sections 54, clauses (1) and (9), 56 and 239 (d)—Offence of rioting—Arrest without warrant by Head Constable in charge of outpost—Validity—Offence of theft included in charge—Legality.

Clause (9) of section 54 does not in any way limit the application of clause (1) of that section; it merely introduces another class of persons who can be arrested without a warrant, namely those for whose arrest a requisition has been received from another police officer. And section 56 (1) does not purport to confine or restrict the application of section 54.

Where the person who made the arrest which led to the rioting was a Head Constable in charge of an outpost who was ordered by the Sub-Inspector of the Station within whose limits the outpost was situated to investigate into an alleged offence,

Held, that the arrest by the Head Constable was a valid one.

Where during the course of the rioting one of the accused was said to have committed the theft of a purse and it was contended that since the theft of the purse was not one of the common objects of the assembly and was committed by one only of the accused without the assistance or abetment of any of the others, the charge of theft could not be joined to the other charges,

Held, that as the offence of theft, though not one of the common objects of the assembly, was certainly committed during the course of the transaction in which all the other offences were committed, the joinder of

*Crl. R. C. No. 274 of 1942. 19th August, 1942.
(Crl. R. P. No. 260 of 1942).

the charge for that offence was permitted by section 239 (*d*), Criminal Procedure Code.

Mohamed Meera Sahib, *In re.*

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of the Tinnevelly Division, dated 31st March, 1942 and made in C.A. Nos. 25 and 26 of 1942, preferred against the judgment in C.C. No. 107 of 1941 on the file of the Court of the Joint Magistrate of Shermadevi.

L. V. Subramaniam for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioners and others were charged with rioting and with committing a number of offences in the course of the rioting. The primary object of the rioting was to secure the release of a person who had been arrested.

During the course of the rioting one of the petitioners is said to have committed the theft of a purse. It is therefore argued that since the theft of a purse was not one of the common objects of the assembly and was committed by one only of the accused without the assistance or abetment of any of the others, this charge of theft could not properly be joined to the other charges. Section 239 (*d*) of the Criminal Procedure Code however permits all persons being tried together for different offences committed in the course of the same transaction; and although it is probably true that the theft was not one of the common objects of the assembly, it certainly was committed during the course of the transaction in which all the other offences were committed.

The other point of law is with regard to the interpretation of sections 54 and 56 of the Code of Criminal Procedure. The person who made the arrest which led to the rioting is a Head Constable in charge of an outpost, who was ordered to investigate into an alleged offence by the Sub-Inspector of the Station within whose limits the outpost was situated. The first clause of section 54 (1) permits a police officer to arrest without a warrant any person concerned in any cognizable offence or against whom information has been received or a reasonable suspicion exists of his having been so concerned. There can therefore be no doubt that if this clause is read alone the arrest by the Head Constable was a valid one, and that therefore the persons who sought to release the arrested person from the lawful custody of the constable were guilty of an offence. It is however argued that clause (*i*) of section 54 (1) has to be read with the 9th clause of that sub-section and also with section 56 (1). The 9th clause does not seek to limit in any way the application of the other clauses. It merely introduces another class of persons who can be arrested without a warrant, *viz.*, those persons for whose arrest a requisition had been received from another police officer. Section 56 (1) does not purport to confine or restrict the application of section 54. It lays down the procedure to be adopted by an officer in charge of a Police Station desirous of requiring an offi-

Mohamed Meera Sahib, *In re.*

cer subordinate to him to arrest without a warrant. No such order was given by the Sub-Inspector in this case to the Head Constable; and so we are not concerned with the procedure to be adopted if the Sub-Inspector had issued such an order. The arrest made by the Head Constable was not made because of any power delegated to him by the Sub-Inspector but in the exercise of his own powers to arrest conferred by the first clause of section 54 (1).

All the other points raised are questions of fact, concerning which there are concurrent findings of the Magistrate and of the Sessions Judge. The revision petition is dismissed.

B.V.V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

The Panchayat Board, Sivaganga through its President .. *Appellant** (*Deft.*)

v.

A. R. Veerabadran Chettiar .. *Respondent* (*Plff.*).

Panchayat Board, Sivaganga *v.* Veerabadran Chettiar.

Madras Local Boards Act (XIV of 1920), Schedule IV, rule 11-A—Scope—Assessment to profession tax—Previous demand to produce income-tax return not made—Assessment by President of Panchayat Board on local enquiry—Validity.

The explanation to rule 11-A in the Fourth Schedule of the Madras Local Boards Act permits the production of the income-tax demand as an alternative to furnishing a return of income under rule 11-A (*i*) and it follows that the production should be within the time fixed by the President for the return in the prescribed form. Where this is not done, the President may fix the assessment upon local enquiry. The assessee received a demand notice on the 15th August, 1938, for the payment of a certain amount as profession tax which he accordingly paid and afterwards preferred an appeal with which he submitted his income-tax papers; in a suit by the assessee to establish that the proceedings in respect of his assessment were irregular, neither the plaintiff nor the Panchayat Board pleaded that there was any previous demand for a return under rule 11-A.

Held, that the Panchayat Board had failed to follow the procedure prescribed by rule 11-A and that the assessment was irregular.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in Appeal Suit No. 9 of 1940 preferred against the decree of the Court of the District Munsiff of Sivaganga in Original Suit No. 141 of 1939.

V. Ramaswami Aiyar for Appellant.

V. K. Thiruvenkatachari for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of the decision of the Subordinate Judge of Sivaganga in favour of the plaintiff that the proceedings in respect of his assessment to profession tax were irregular and that he was entitled to a refund of the amount claimed. The plaintiff's case was that after he had been assessed to profession tax by the Panchayat Board of Sivaganga, he produced his income-tax demand for the year comprising the half year in question under the Explanation to rule 11-A of the Fourth Sche-

*S.A. No. 685 of 1942. 20th August, 1942.
(C.R.P. No. 2392 of 1940 converted into the Second Appeal by Order of the Court, dated 21st July, 1942.)

Panchayat Board, Sivaganga v. Veerabadran Chettiar.

dule of the Madras Local Boards Act. At the same time he preferred an appeal but the appellate tribunal declined to accept the figures given in his income-tax papers and dismissed his appeal. The learned Subordinate Judge found that the procedure was irregular and consequently section 228 of the Act gave no protection to the panchayat board. He found that the appeal committee was bound to accept the figures given in the income-tax papers and he decreed the suit accordingly. It is against this decision that the panchayat board has appealed. A preliminary objection that no appeal lies against the suit because it is of the nature cognisable by the Court of Small Causes need not be examined because this Court has already held on a revision petition preferred by the appellant that no revision lay and that the matter should be agitated by means of a second appeal, into which the revision petition was with the leave of Court converted.

The view taken by the learned Subordinate Judge regarding the stage at which the income-tax demand notice can be availed of by an assessee is wrong. The explanation to rule 11-A in the fourth schedule contemplates the production of the income-tax demand as an alternative to furnishing a return of income under rule 11-A (*i*) and it follows that the production should be within the time fixed by the president for the return in the prescribed form. According to the plaintiff's own case this was not done, because he produced his income-tax papers only before the appellate tribunal. On this ground, therefore, the judgment of the learned Subordinate Judge is liable to be set aside and the suit dismissed. However, on looking into the other facts of the case it can readily be seen that the proceedings before the panchayat board were irregular in other respects. According to the plaintiff's case as set out in the plaint, he received a demand notice on 15th August, 1938, for the payment of Rs. 10 as profession tax which he accordingly paid and afterwards preferred an appeal with which he submitted his income-tax papers. There is no reference in the plaint to any previous demand for a return under rule 11-A and in the written statement of the panchayat board, the president pleaded that the assessment was fixed by him under the rules upon local enquiry and was correct. Nowhere in the written statement was there any suggestion that the panchayat board had issued a notice under rule 11-A and that the plaintiff had failed to make a return. If the plaintiff had failed to make a return or submit his income-tax demand in answer to a notice issued under rule 11-A, the panchayat board had an unanswerable case. Under those circumstances the president would have then proceeded to assess the plaintiff under clause (3) of rule 11-A. The only conclusion possible on the pleadings is that the panchayat board failed to follow the procedure laid down in rule 11-A and that the plaintiff's first knowledge of the proceedings was the board's demand for profession tax of Rs. 10. Consequently I find that the assessment proceedings were irregular, although for different reasons given by the learned Subordinate Judge and in the result the Second Appeal is ordered to be dismissed with costs.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE BYERS.

C. D. Desikachari .. *Appellant** (*Petitioner*)

v.

The Official Receiver, Chingleput and others .. *Respondents* (*Respt. and nil*).

Desikachari *v.* Official Receiver, Chingleput.

Provincial Insolvency Act (V of 1920), section 37—Principle of section—Applicability—Order granting discharge—Administration of estate not reserved—Application for sale seven years later—Maintainability.

The insolvent was granted an absolute discharge on the ground that there was no *mala fide* conduct on his part and because no creditor had proved his debt before the Official Receiver and therefore no one was entitled to oppose his discharge. The order granting the discharge did not in terms provide for any future administration of the insolvent's property. More than seven years later one of the Official Receiver's creditors applied that the insolvent's property should be sold and the District Judge directed a sale.

Held, that the principle of section 37 of the Provincial Insolvency Act was applicable to the case, that the administration of the insolvency was brought to an end by the Court's order granting an absolute order of discharge and that the Official Receiver could not bring any of the properties of the insolvent to sale.

Appeal against the order of the District Court of Chingleput, dated the 23rd day of July, 1940 and made in I.A. No. 1344 of 1939 in I.P. No. 41 of 1930 on the file of the Court of the Subordinate Judge of Chingleput.

C. R. Rajagopalachariar for Appellant.

G. N. Thirumalachari for Respondents.

The Judgment of the Court was delivered by

King, J.

King, J.—This is an extraordinary case. The appellant on his own petition was adjudicated an insolvent in December, 1930. In July, 1932, he was granted an absolute order of discharge and the order shows that this was granted for two reasons—(1) because there was no *mala fide* conduct on the part of the insolvent and (2) because no creditor had proved his debt before the Official Receiver and therefore no one was entitled to oppose his petition for an order of absolute discharge. At the time of the insolvent's discharge apparently the insolvent was in possession of a number of acres of wet and dry lands and this property was vested in the Official Receiver. Naturally, when the order of discharge was granted the Official Receiver had done nothing in regard to the disposal of this property as there were no creditors properly before him. More than 7 years later one of the Official Receiver's creditors applied that the insolvent's property should be sold and the learned District Judge of Chingleput has ordered that the property can be sold at the instance of this creditor by the Official Receiver. It is clear that if such an order can be justified, it amounts to a complete frustration of the intention of the Insolvency Law. The whole purpose of the Insolvency Act is that proceedings in insolvency shall be dealt with as expeditiously as possible, that the creditors shall be satisfied as expeditiously as possible from the property of the insolvent, and that

*A.A.O. No. 614 of 1940. 3rd July, 1942.

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the insolvent shall then be free to start life again unburdened by his debts. The situation in 1932 clearly was that—for whatever reason it is impossible now to say—none of the creditors of the insolvent took the slightest interest in the insolvency proceedings. There must have been plenty of time for them to prove their claims, but they did not care to do so. As the learned Subordinate Judge in 1932 has made special reference to this fact there is good reason to assume that although he was aware that there was property belonging to the insolvent he held that the administration of that property had come almost automatically to an end because none of the creditors took any interest in it. The present contention on behalf of the creditor at whose instance the Official Receiver was ordered to sell the property amounts to this: that he can proceed at any time he pleases against the insolvent's property no matter how many years he may have waited after the insolvency proceedings began before he attempted to prove his debt. This is a position of which no Court can possibly approve.

No doubt it is argued that the granting of an absolute order of discharge does not necessarily put an end to the administration of the insolvent's property. There is nothing to prevent the Court granting an absolute order of discharge when it has been satisfied for instance, that the insolvent had placed all his property within the control of the Official Receiver so that from his —insolvent's—point of view nothing more remains to be done. We think that although section 37 of the Act does not in terms apply to the circumstances of this case, the principle which is embodied in that section should apply. It is clear that when an adjudication is annulled, it is for the Court to decide whether the property should continue to vest in the Official Receiver or not. Nothing specific has been stated on this point in the order of 1932 granting an absolute order of discharge, and if there were anything to show that the Court had in its mind any contemplation of the future administration of the insolvent's estate we would agree that the order could not have the effect of re-vesting the property in the insolvent. It is however clear that when the learned Subordinate Judge gave as one reason for his order of absolute discharge the fact that no creditor had proved his debt that means in effect that there is no chance of any administering of the insolvent's property. We cannot confirm the order of the learned District Judge passed eight years later which in effect thus cancels and nullifies the order of 1932. That, in our opinion, would be a complete breach of faith on the part of the Court towards the insolvent. We accordingly hold that the administration of this particular insolvency was brought to an end by the Court's order granting the absolute order of discharge in 1932 and therefore there is no longer power in the Official Receiver to bring any of the properties of the ex-insolvent to sale. This appeal must accordingly be allowed and the order of the learned District Judge set aside with costs throughout.

B.V.V. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Rao Bahadur Mothey Gangaraju Zamindar Garu of Ellore .. *Petitioner** *(Petitioner)*

v.

Sree Raja Bommadevara Venkatrayulu Naidu Bahadur Zamindar Garu of Pangidigudem .. *Respondent* *(Respondent)*.

Gangaraju *v.* Venkatrayulu Naidu.

Civil Procedure Code (V of 1908), Order 21, rule 93 and Order 47, rule 8—Auction sale—Deposit of amount including poundage—Sale set aside—Application for return of amount—Court directing return with interest—Erroneous direction regarding poundage—Application for review by decree-holder—Order modified regarding interest and poundage—Validity.

The auction purchaser at a court sale deposited the money required including poundage and that amount remained in Court for four years. In the meanwhile the judgment-debtor initiated proceedings which resulted in the setting aside of the sale. The auction purchaser thereupon applied for the return of his purchase money and also for the return of poundage. The Court ordered the return of the money with interest, but the petitioner was informed that he should apply to the Government if he wished to obtain refund of the poundage. The decree-holder subsequently applied for review on the ground that he should not have been called upon to pay interest. The Court granted the review and passed an order refusing to call upon the decree-holder to pay any interest to the auction purchaser. The Court further reviewed that part of its previous order which dealt with the question of poundage and held that one half of the poundage should be paid by the decree-holder to the auction purchaser and that in respect of the other half he should apply to Government. The decree-holder preferred a revision petition to the High Court and therein contended that the modification as regards poundage was not justified. The respondent contended on the other hand that the circumstances did not justify the granting of the application for review.

Held, that the first order of the lower Court calling on the decree-holder to pay interest to the auction purchaser was not justified by the terms of rule 93 of Order 21, Civil Procedure Code, and as there was an error of law on the face of the order, the lower Court was justified in granting the review.

Rule 93 of Order 21 deals with the whole question of what is to happen to the money which has been deposited by the auction purchaser when a sale has been set aside, and the fact that rule 93 permits the Court to make a particular order against a party only if the party has received the money is exhaustive and means that no order can be passed against him in any other circumstances.

Held, further, that the Court was competent in disposing of the review application to modify its previous order regarding poundage.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Ellore, dated 4th December, 1939 and made in C.M.P. No. 337 of 1939 in O.S. No. 37 of 1931 on the file of the District Court of West Godavari at Ellore.

V. S. Narasimhachar for Petitioner.

P. Somasundaram for Respondent.

The Court delivered the following

JUDGMENT.—The parties in this petition are decree-holder and auction purchaser respectively in the matter of a sale held in 1933. The auction purchaser, of course, deposited the money required including poundage, and this money remained in Court

*C.R.P. No. 941 of 1940. 23rd July, 1942.

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for four years. In the meanwhile the judgment-debtor initiated proceedings which resulted in the setting aside of the sale. The auction purchaser accordingly applied for the return of his purchase money and also for the return of poundage. The first order which was passed by the learned Subordinate Judge of Ellore was on the 25th November, 1939. In that order the return of the money with interest was ordered, but the petitioner was informed that he should apply to Government if he wished to obtain refund of the poundage. The decree-holder was dissatisfied with this order in so far as it called upon him to pay interest and he applied under Order 47 for review. The learned Subordinate Judge granted the review and passed an order refusing to call upon the decree-holder to pay any interest to the auction purchaser. He also reviewed that part of his previous order which dealt with the question of poundage holding that one half of the poundage should be paid by the decree-holder to the auction purchaser and that in respect of the other half, he should apply to Government. It is the decree-holder who is the present petitioner. Although he is satisfied with the review in so far as it frees him from the liability of paying any interest, he holds that the modification in the order in regard to poundage is not justified and should be revised, his point being that as there was no application either by himself or his opponent for any modification of the order in so far as it related to the poundage the Court had no jurisdiction to modify it. It seems to me that this contention must fail inasmuch as rule 8 of Order 47 clearly lays it down that when the Court grants an application for review it may at once "re-hear the case". That surely means that it may hear the case in full and deal with every point which it is necessary to consider before passing a fresh order.

The respondent in this petition also objects to the order passed upon review for another reason. His ground is that the circumstances did not justify the granting of the application for review. This application was granted, it should now be mentioned, because the Court found on referring to rule 93 of Order 21, that the order to pay interest could be passed only against a person to whom money had been paid. Admittedly, in this case, the money had remained throughout in Court deposit. The first order therefore calling upon the decree-holder to pay interest to the auction purchaser was not justified by the terms of rule 93. Holding, accordingly, that the order disclosed on the face of it, an error of law, the learned Judge granted the review. It is now argued for the respondent that rule 93 is not exhaustive in this respect and that even though under rule 93 there was no power in the Court to pass any order for the payment of interest, such a power is inherent in the Court and can be invoked under the provisions of section 151. There is no authority in support of this contention, and it is a well-known principle of law that, where special provisions exist in the Code to deal with particular situations, section 151 cannot be invoked. In my opinion rule 93 of Order 21 deals with the whole question of what is to happen to the money which has been deposited by the auction purchaser when a sale has been set aside, and the fact that rule 93 permits

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the Court to make a particular order against a party only if that party has received the money is to my mind exhaustive, and means that no order can be passed against him in any other circumstances. I am accordingly of opinion that the learned Subordinate Judge was right when he held that he was entitled to review his previous order under the provisions of Order 47.

In the result this civil revision petition must fail and the memorandum of cross-objections also fails. Each is dismissed with costs.

B.V.V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Alati Appalaswamy and another .. *Petitioners* (Accused).*

Appalaswamy, *In re.*

Defence of India Rules (1939), rules 35 (4) and 38 (5)—"Prejudicial act"—Bringing about strike by workers of mill to redress grievance—Knowledge that war work would be impeded—If makes the strike a prejudicial act "without lawful excuse".

Where the motive for the calling of a strike was to remedy what the accused and others considered to be an arbitrary exercise of the employer's power of dismissal without a fair inquiry and without giving a reasonable warning to a worker and there was no other method of redressing their grievance except by going on strike, it must be held that they had a "lawful excuse" for the strike even though the accused knew that as a result of the strike essential war work would be impeded.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of the Vizagapatam division in C.A. No. 172 of 1941 preferred against the judgment of the Court of the Joint Magistrate of Vizianagaram in C.C. No. 157 of 1941.

C. V. Dikshutulu for *B. Jagannadha Das* for Petitioners.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The petitioners are the president and vice-president of the Chittivalasa Labour Union, connected with the Chittivalasa Mills. They have been convicted under rule 35 (4) read with rule 38 (5) of the Defence of India Rules and sentenced by the Joint Magistrate of Vizianagaram to nine months' rigorous imprisonment each. In appeal to the Sessions Judge, these convictions were confirmed as well as the sentences.

The prejudicial act alleged to have been committed by the petitioners was the bringing about of a strike by the mill workers and thereby impeding the war effort; for the mill in question was turning out sand bags and other articles urgently required by the Government for the prosecution of the war. The petitioners also indulged in picketting, thus dissuading workers from going to work. The reason for the strike was that a woman named Ellamma was dismissed because she stuck a bodkin or needle of

*Crl.R.C. No. 206 of 1942. 29th July, 1942.
(Crl.R.P. No. 203 of 1942.)

Appala-swamy, *In re.*

some sort into another worker. The Labour Union seems to have thought that she ought to have been given two or three warnings before she was dismissed and that she was dismissed without a proper inquiry. These omissions, the Union considered, were very objectionable, and if repeated would affect the interests of the whole body of workers. A strike was therefore ordered and the workers persuaded not to go to work. The learned Magistrate rightly found that the strike necessarily involved a reduction in the output of the mill; and he thought that as the petitioners were aware of the fact that the mill was doing war work, they were guilty of doing a prejudicial act.

Rule 38 (1) says that no person shall without lawful authority or excuse (*a*) do any prejudicial act . . . . . The learned Magistrate and the learned Sessions Judge unfortunately did not further consider whether the petitioners acted without lawful authority or excuse.

The simple question that falls for decision here is therefore whether the petitioners had a lawful excuse for calling on this strike. Strikes and lockouts, though clumsy and injurious, are the only existing means of deciding trade disputes; and the calling of a strike has not yet been declared to be illegal. If the petitioners had called the strike with the object of impeding the war effort and not merely with the knowledge that it would impede the war effort, they would undoubtedly have been guilty of the offence with which they were charged. There however seems very little doubt that the motive for the calling of the strike was to remedy what the petitioners and others considered to be an arbitrary exercise of the employers' power of dismissal without a fair inquiry and without giving a reasonable warning to the worker. The evidence indicates that the petitioners interviewed the Collector of Vizagapatam even before the strike was declared, and asked him to intervene. There can therefore be no doubt from the record that the petitioners were primarily concerned with remedying their real or supposed grievance with regard to the treatment of Ellamma. As the petitioners and their union had no other method of redressing their grievance except by going on strike, it must be held that they had a lawful excuse for the strike, even though the petitioners knew that as a result of the strike essential war work would be impeded.

As the petitioners acted with a lawful excuse, they were not guilty of any offence punishable under the Defence of India Rules. The petition is therefore allowed, the convictions and sentences are set aside, and the bail bonds of the petitioners cancelled.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Valliammal .. *Appellant** (*Plaintiff*)

v.

Ramaswamy Goundar and others .. *Respondents* (*Defts.*).

Valliammal v. Ramaswamy Goundar.

Madras Agriculturists' Relief Act (IV of 1938)—Mortgage by purchaser of hypotheca in renewal of earlier mortgages—Fresh mortgage covering additional property and having consideration made up of discharge of earlier mortgages as well as fresh amounts—Whether purchaser entitled to claim relief of scaling down in respect of earlier debt.

Where a person purchased a mortgaged property and became a debtor of the mortgagee to the extent of the liability under certain existing mortgages binding the land and he discharged that liability by executing a fresh mortgage in which were included other items of consideration besides the discharge of the earlier mortgages,

Held, that the purchaser who was an agriculturist could claim that the original principal of the earlier mortgages was included in the principal of the fresh mortgage to the extent to which the amount due under those mortgages contributes to the consideration of the fresh mortgage and the portion of the consideration which was made up of the discharge of the earlier mortgages should be scaled down on the basis of the principal of those mortgages.

Perianna Goundan v. *Sellappa Goundan*, (1938) 2 M.L.J. 1068: I.L.R. (1939) M. 218; *Palani Goundan* v. *Peria Goundan*, (1940) 2 M.L.J. 887, relied on.

Held, further, the fact that the later mortgage binds property not covered by the earlier mortgages cannot affect the question whether the later mortgage is a renewal of the earlier mortgages. Nor will the answer to the question be affected by the fact that the later mortgage comprises an additional consideration besides the discharge of the earlier mortgages.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore, dated 8th November, 1939 and passed in O.S. No. 262 of 1938.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *K. V. Ramaseshan* for Appellant.

V. Minakshisundaram for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The plaintiff is the appellant. Her husband advanced money under two mortgages, Exs. C and D, to one Palani Goundan and his son. These mortgages are dated respectively, 1917 and 1918. Ex. C was itself a renewal of a still earlier mortgage, Ex. II, between the same parties. In 1923 in execution of a money decree against the son of Palani Goundan the properties were sold in court auction and purchased by a Chettiar gentleman who in 1924 sold those properties to the first defendant, one of the conditions of the sale being the discharge of the mortgages, Exs. C and D, which bound the properties. We do not know whether Palani Goundan or his son were agriculturists. The defendants are admittedly agriculturists. On 9th July, 1924, the first defendant (the purchaser) executed the suit mortgage, Ex. A, for a sum of Rs. 10,000 in favour of the plaintiff's husband binding the properties covered by Exs. C and D and a considerable extent of other properties belonging to the

*Appeal No. 251 of 1940. 9th July, 1942.

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first defendant. The consideration for the suit mortgage was the discharge of the earlier mortgages Exs. C and D in favour of the plaintiff's husband, the discharge of a promissory note executed by the first defendant to a third party and a sum of money advanced in cash. The suit was filed on the basis that the defendants were entitled to the benefits of Act IV of 1938 to the extent of the cancellation of the interest outstanding on Ex. A on 1st October, 1937, and the scaling down of subsequent interest to 6¼ per cent. The defendants successfully contended in the lower Court that they were entitled to relief, so far as the portion of the consideration made up of the discharge of the earlier mortgages was concerned, on the basis that the principal of the debt was the principal of Exs. D and II, the earlier mortgages discharged by Ex. C.

It is contended in appeal that the relief available to the defendants should have been restricted to that conceded in the plaint. It seems to us that the matter is covered by authority adverse to the appellant. The decision in *Doraikannu Odayar* v. *Veerasami Padayachi*[1] applied the principle of *Perianna's case, Perianna Goundan* v. *Sellappa Goundan*,[2] to a case of renewal and it was held that a person who by reason of the purchase of property bound by mortgage is under a liability to discharge that mortgage and subsequently discharges that liability by the execution of a fresh document can be said to be renewing his own pre-existing liability. More recently we have had to deal with a case in which the original mortgagor was not shown to be an agriculturist; and in *Palani Goundan* v. *Peria Goundan*,[3] it was observed that it is immaterial whether or not the debtor had the character of an agriculturist when the debt was originally incurred if it was incurred prior to 1st October, 1937. From these decisions it follows that the first defendant when he purchased the property became a debtor to the plaintiff's husband to the extent of the liability under the existing mortgages binding that land and when he discharged those liabilities by executing a fresh mortgage he can claim that the original principal of the earlier mortgages was included in the principal of the fresh mortgage to the extent to which the amount due under those mortgages contributes to the consideration of the fresh mortgage. It has been suggested that the fact that Ex. A binds property not covered by the pre-existing mortgage should affect the question whether Ex. A is a renewal of those previous mortgages. It seems to us that this is immaterial, the only question being whether the debtor under Ex. A was a debtor under the pre-existing mortgages. The extent of the security under the later mortgage will not govern the answer to this question. Nor will the answer to the question be affected by the fact that the later mortgage comprises an additional consideration besides the discharge of the earlier mortgages. That portion of the consideration which is made up of the discharge of the earlier mortgages will be scaled

1. (1940) 2 M.L.J. 651.
2. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.
3. (1940) 2 M.L.J. 887.

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down on the basis of the principal of those mortgages. This is the view taken by the lower Court and we therefore dismiss the appeal with costs.

K.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Malabar District Board, Calicut .. *Petitioner* (Deft.)*

v.

The Cochin Malabar Estates, Limited, by its Managing Agents and Secretaries, Messrs. Pierce Leslie and Company, Limited, Calicut and another .. *Respondents (Plffs.).*

Malabar District Board v. Cochin Malabar Estates, Ltd.

Madras Local Boards Act (XIV of 1920), section 93 and Schedule IV, rule 10—Transacting business within jurisdiction—What amounts to—"Having place of employment" within local area—Meaning.

The words "transacting business" in section 93 of the Madras Local Boards Act means "carrying on business" and a company "carries on business" only at the place where it enters into contracts in connection with its business.

Where a company was formed outside the jurisdiction of a District Board *"to acquire estates in any part of the world on which rubber or other produce has been planted or which are suitable for the cultivation of rubber or other produce, to cultivate rubber . . . . and to sell, dispose of and deal in any such produce either in its prepared or raw state and either wholesale or retail"* the mere growing of rubber trees and obtaining rubber within the jurisdiction of the District Board is only ancillary to the business of selling rubber and unless contracts are entered into or there is an office, within the jurisdiction of the District Board the company is not liable to pay profession tax. Nor can it be said that the company has a "place of employment" within the local area by reason of its employing labour within the area. "Place of employment" means the place of employment of a person who is employed and by reason of his employment is liable to pay profession tax. It cannot be said that the company is "employed" within the area.

Petitions under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decrees of the Court of the District Munsiff of Calicut in S.C.S. Nos. 353 and 354 of 1938, respectively.

P. Govinda Menon for Petitioner.

O. T. G. Nambiar for Respondents.

This petition coming on for hearing, the Court (*Somayya, J.*) made the following

ORDER.

7th July, 1942.

The question arising for decision in these two civil revision petitions is whether the plaintiff-respondent was transacting business within the meaning of section 93 of the Local Boards Act of 1920. Rule 10 framed under that Act runs as follows:

> "A company or person shall be deemed to have transacted business . . . . . . if such company or person has an office or place of employment within such local area."

The two plaintiffs in the two cases are companies, one having its Head Office at Calicut and the other in England. The objects for which the two companies were formed are among other things, "to acquire estates in any part of the world on which rubber or other produce has been planted or which are

*C.R.P. Nos. 1696 and 1697 of 1939. 15th July, 1942.

suitable for the cultivation of rubber or other produce, to cultivate rubber . . . . . . and to sell, dispose of and deal in any such produce either in its prepared, manufactured or raw state and either wholesale or retail.'' The companies are the owners of certain rubber plantations which are situated in the District of South Malabar. The District Board levied profession tax and the two suits were filed for refund of the tax which was paid under protest. The defence is that the companies transacted business within the meaning of section 93 of the Act and it is further amplified by saying that the companies have an office and a place of employment in the local area, that is within the district. It is admitted that no sales or purchases are effected within the district. The question is whether the facts proved in this case that the plaintiffs have rubber plantations and that they have got factories where the rubber is prepared, packed and sent to either Calicut or other places outside the district and the employment of several persons for keeping accounts and the like which are spoken to by the plaintiffs' witnesses amount to either carrying on business or having a place of employment within the meaning of rule 10, or to put it in other words, to transacting business within the meaning of section 93 of the Act. The liability is a recurring one and the question is not covered by direct authority, though on some aspects of the case there are one or two decisions. It appears that there are other estates similarly situated and it is better that the question is decided by a Bench. I therefore direct the papers to be placed before the learned Chief Justice for necessary action.

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(These petitions coming on for hearing in pursuance of the aforesaid Order, the judgment of the Court was delivered by)

Leach, C.J.

The Chief Justice.—These two revision petitions raise the same question of law and have been heard together. In C.R.P. No. 1696 of 1939, the Court has to decide whether the Malabar District Board, Calicut, is entitled to impose the profession tax on the Cochin Malabar Estates, Limited, a limited liability company registered under the Indian Companies Act and in C.R.P. No. 1697 of 1939, whether it is entitled to impose the tax on the Kerala Calicut Rubber Estates, Limited, a limited liability company registered in England. Both these companies possess rubber estates within the jurisdiction of the Malabar District Board. The office of the Cochin Malabar Estates, Limited, is situate in Calicut and there all contracts with regard to the sale of the company's rubber are entered into. The managing agents of the company are Pierce Leslie and Company, Limited, whose office also is in Calicut. Pierce Leslie and Company are also the managing agents of the Kerala Calicut Rubber Estates, Limited. The office of that company is in London and its contracts are entered into there. For the years 1934-35 and 1935-36, the District Board demanded from the Cochin Malabar Estates, Limited, the sum of Rs. 57-8-0 by way of profession tax. In respect of the Kerala Calicut Rubber Estates, Limited, the imposition was for three years, 1934-35, 1935-36 and 1936-37, and the total amount here was Rs. 145. The companies were compelled to meet the demands made upon them, but they instituted suits in the District Munsiff's Court at Calicut to recover the monies paid. The District Munsiff found that the demands of the District Board were unlawful and decreed the suits. The District Board asks this Court to set aside the decrees in the exercise of its powers of revision. We consider that the District Munsiff was right.

Section 93 of the Madras Local Boards Act allows a District Board to levy a profession tax on a company which transacts

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business within its jurisdiction for not less than sixty days in the aggregate in any half year. Rule 10 of Schedule IV of the Act says,

"A company or person shall be deemed to have transacted business or exercised a profession, art, or calling, or held an appointment within a local area if such company or person has an office or place of employment within such local area."

In *Municipal Council, Dindigul* v. *Bombay Co., Ltd.*,[1] this Court held that the expression "transacting business" in section 92 of the Madras District Municipalities Act, means carrying on business, and that decision has full application here. In *Municipal Council of Coconada* v. *"Clan" Line Steamers, Ltd.*,[2] the Court held that a company carries on business only at the place where it enters into contracts in connection with its business; and a similar decision was given in *Pachiammal* v. *The Hindustan Co-operative Insurance Society, Ltd., Madras.*[3]

It is clear in the light of these authorities that these companies do not carry on business within the jurisdiction of the Malabar District Board. They certainly grow rubber trees there and obtain rubber from them but this is only ancillary to their business of selling rubber. In one case no contracts are entered into outside Calicut and in the other case outside London and neither company has an office within the jurisdiction of the District Board.

On behalf of the District Board, Mr. Govinda Menon says that rule 10 makes a company liable where it has a place of employment within the local area, and the companies employ labour within the area. This argument obviously cannot be accepted. The expression "place of employment" here means the place of employment of a person who is employed and by reason of his employment is liable to pay profession tax. Obviously, it cannot be said that the companies are employed. When section 93 and rule 10 of Schedule IV are read with the help of the cases which have been referred to it is clear that the companies are not liable to pay profession tax to the District Board.

The petitions will be dismissed with costs.

K.S. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING

(on a difference of opinion between)

MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

M. Raghava Reddiar .. *Appellant** *(Deft.)*

v.

Odur Devarajulu Reddiar .. *Respondent (Plff.).*

Raghava Reddiar v. Devarajulu Reddiar.

Madras Agriculturists' Relief Act (IV of 1938), section 8 (1)—Open payment by debtor made before 1st October, 1937, in excess of the interest then due—Appropriation for purposes of scaling down—Contract Act (IX of 1872), section 60.

Appropriation is the indication of an intention that money would be applied in a particular way. The most ordinary way of proving the in-

1. (1928) 56 M.L.J. 525: I.L.R. 52 Mad. 207.
2. (1918) 36 M.L.J. 226: I.L.R. 42 Mad. 455.
3. (1940) 2 M.L.J. 688: I.L.R. (1941) Mad. 109.

*S.A. No. 593 of 1941. 22nd September, 1942.

tention is by proof of a statement made either orally or in writing. But that is not the only kind of proof possible. It may be proved by circumstantial evidence as is recognised in section 60 of the Contract Act and in the decision of the Privy Council in *Rama Shah* v. *Lalchand,* (1940) 1 M.L.J. 895: L.R. 67 I.A. 160: I.L.R. 21 Lah. 470 (P.C.).

Accordingly where a debtor had paid his creditor in 1936, a sum which was greater by several hundreds of rupees than the interest then due, endorsing the payment generally as paid towards the promissory note, and there was nothing to suggest that he did not know the extent of his indebtedness or the amount of interest due or that he intended only to pay interest and not principal, it can and ought to be held that the debtor on that occasion did intend to pay off part of the principal of his debt and indicate that intention by the very act of the payment. The debt should be scaled down on that basis in granting relief under Act IV of 1938.

Duraiswami Aiyangar v. *Raghavachariar,* (1940) 2 M.L.J. 648, distinguished.

Narasareddi v. *Rangareddi,* (1941) 1 M.L.J. 216, considered.

Appeal against the decree of the District Court of Chingleput in A.S. No. 93 of 1939 preferred against the decree of the Court of the District Munsiff of Chingleput in O.S. No. 233 of 1938.

T. R. Srinivasan for Appellant.

S. Panchapagesa Sastri and *T. K. Sundararaman* for Respondent.

This appeal coming on for hearing on 3rd August, 1942, the Court (*Wadsworth and Patanjali Sastri, JJ.*) delivered the following

JUDGMENTS: *Wadsworth, J.*—This appeal raises a question under section 8 (1) of the Madras Agriculturists' Relief Act (IV of 1938). The appellant was indebted to the plaintiff under a promissory note, dated 9th June, 1934, for a sum of Rs. 1,806-14-6. This promissory note was a renewal of an earlier promissory note of 1931 for Rs. 1,400. Two payments were made (1) Rs. 100 on 1st June, 1935 and (2) Rs. 940 on 2nd October, 1936. Both these payments were endorsed generally as paid towards the promissory note. The argument of the respondent is that the second payment, being to the extent of Rs. 218 more than the interest due on the date of the payment, must be deemed to this extent at least to have been appropriated towards the principal of the renewed promissory note. It is not disputed that the Courts below are wrong in treating these payments as having been appropriated firstly towards the interest and then towards the principal so as to reduce the amount of interest available for cancellation under Act IV as on 1st October, 1937. But the respondent contends that he should have the advantage of the decision of this Bench in *Narasareddi* v. *Rangareddi*[1] and that to the extent to which the second payment can be shown to have gone in reduction of the composite principal of the renewed note, which itself included interest on the original borrowing, it is not possible for the defendant to show that this amount is available as on 1st October, 1937, to go in reduction of the original principal.

The respondent's argument is based on two passages in the judgment of the Privy Council in the case of *Rama Shah* v. *Lalchand.*[2] On the facts of that particular case their Lordships were not concerned with the effect of a payment exceeding the amount of interest due at the time of the endorsement. It is expressly pointed out that,

"There is no room for the contention that the sum of Rs. 100 exceeded the amount of principal or of interest outstanding in respect of the note at the date of the payment, so that part of it at least must of necessity have been intended to go towards interest or towards principal."

Their Lordships were dealing solely with a plea of limitation based on the contention that a payment of Rs. 100 made towards the promissory note generally could not be regarded as a payment of "interest as such" or as a

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1. (1941) 1 M.L.J. 216.
2. (1940) 1 M.L.J. 895: L.R. 67 I.A. 160: I.L.R. 21 Lah. 470 (P.C.).

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payment of principal so as to save limitation under section 20. In the course of the discussion their Lordships proceed to state their opinion as to the effect of section 20 in a case where the debtor has made a payment on account of an interest-bearing debt without appropriating the sum paid either towards the interest or principal and where the creditor has made no appropriation until after the expiry of the period of limitation. They proceed to differentiate a case of a payment made in full discharge of the balance of an instalment with interest thereon, which was necessarily appropriated in the only possible way and was sufficient to save limitation under section 20 and they point out the inference, that the intention of the debtor may be proved not only by statements made by him at the time of payment but in any other manner and may clearly appear from the circumstances of the case. They then go on to point out that an appropriation of such a payment towards interest cannot be inferred by reason of the rule that it is the right of a creditor to have payments treated on account as liquidating the interest before the principal. For a payment of "interest as such," there must be an intention of the debtor to appropriate the payment towards interest. Their Lordships then point out the distinction under section 20 between payments towards "interest as such" and payments towards principal and while emphasising this distinction they observe,

"Of course a payment may be shown to have been intended by the debtor to go in part at least towards the reduction of the principal debt by direct proof or for instance, by the fact that the amount of the payment exceeded the interest then due."

It is this observation which forms the basis of the respondent's argument.

As I read this observation which is used by their Lordships merely by way of illustration, it does not seem to me to lay down any rule of law, that in every case where a payment exceeds the amount of interest then due, the amount of the excess over the interest must necessarily be deemed to have been appropriated by the debtor towards the principal. No doubt the Courts may draw such an inference on the facts of any particular case and may treat such a payment as sufficient to save limitation under section 20 of the Limitation Act. But as is pointed out later in the same judgment,

"There are four possibilities as to the debtor's intention when an open payment is made—(1) intention that the sum paid should go against interest, (2) that it should go against principal, (3) that it should go against both interest and principal, and (4) no intention of appropriation as between interest and principal. This is a common enough frame of mind when the payment is made generally on account of a debt."

Their Lordships conclude with reference to the particular facts before them that,

"while not of opinion that it need be shown that the creditor's appropriation has within the time limited been communicated to the debtor, they are unable to regard the language of the section as satisfied unless within the prescribed period the creditor has in exercise of his right done something which treats the payment as made on account of principal."

This judgment was considered by this Bench when deciding the case of *Duraiswami Aiyangar* v. *Raghavachariar*,[1] the facts of which case bear a great similarity to the facts with which we are now faced. That was a case of a promissory note of 1935 for a sum of Rs. 1,900, renewing an earlier note of 1926 for a sum of Rs. 1,000. In August, 1937, that is to say, a little more than two years after the execution of the second promissory note, a payment of Rs. 1,000 was endorsed towards that note generally. The Court had to apply section 8 of Madras Act IV of 1938 to these facts and it repelled the contention that the payment of August, 1937, must be deemed to have been appropriated in the manner most favourable to the creditor. The decision of the Privy Council in *Rama Shah* v. *Lalchand*[2] is authority for the proposition that, when there is an open payment towards

1. (1940) 2 M.L.J. 648.

2. (1940) 1 M.L.J. 895: L.R. 67 I.A. 160: I.L.R. 21 Lah. 470 (P.C.).

a debt, a mere notional appropriation cannot take the place of an actual appropriation for the purpose of saving limitation and we applied the same principle to cases under section 8 of Act IV. It is true that the precise argument now advanced was not considered by this Bench in dealing with that case. Our later decision in *Narasa Reddi* v. *Rangareddi*[1] was not yet available and it was not contended that the payment of Rs. 1,000 may be regarded as having been appropriated to the composite principal of the renewed note to the extent to which the payment exceeded the interest then due on that note. But the very case on which this argument is based was cited at length before us and fully considered. It seems to me that it is no longer open to this Bench when dealing with almost precisely similar facts to treat the judgment upon which our decision in *Duraiswami Aiyangar* v. *Raghavachariar*[2] was based as authority for a rule substantially different from the rule which we have there laid down.

Duraiswami Aiyangar's case[2] has been followed in a great many other cases by this Bench and it is the basis of a settled practice in dealing with cases under section 8 of Act IV. Act IV itself gives no guidance as to the way in which open payments made before 1st October, 1937, should be treated. One possible way of treating such payments would have been to hold that though not actually adjusted to the debt in any particular way, they are payments made towards the debt and that in such circumstances the burden lies upon the debtor to prove the absence of an appropriation towards interest available for cancellation as on 1st October, 1937. On the authority of the decision of the Privy Council, we did not take that view, but held that there must be an actual adjustment towards the debt if the payment is to be regarded as reducing the amount of interest available for cancellation at a later date. It seems to me that it would be illogical to hold that when there has been no adjustment towards the debt, the Court should anticipate an adjustment to the extent to which it should inevitably have to be made, to the advantage of the creditor. Either the payment must be regarded as a payment adjusted towards the debt or as a payment still in suspense. In the former case the burden would lie upon the debtor to prove the manner of appropriation most favourable to himself. In the latter case, the creditor not being able to prove an adjustment, the debtor has the benefit of these payments in reduction of principal after the interest has been scaled down. It is the latter view which appeared to us to be correct and it seems to me most undesirable on the principle of *stare decisis* to lay down a modification of this rule importing to some extent a theory of notional or necessary appropriation, when no appropriation has in fact been made.

In this view I would allow the appeal and give the plaintiff a decree for the amount of Rs. 360 with interest at 6¼ per cent. from 1st October, 1937, to the date of the trial Court's decree and proportionate costs in the trial Court and subsequent interest at 6 per cent. The appellant would be entitled to full costs here and in the lower appellate Court and will receive costs in the trial Court on the amount of the claim which has been disallowed.

Patanjali Sastri, J.—I regret I have to differ from my learned brother on the main question argued in this second appeal. The facts giving rise to the question have all been stated in his judgment which I have had the advantage of reading and it is unnecessary to restate them here.

The question, put in general terms, is whether a payment, on account of a particular debt, of a sum which is in excess of the interest then due can, to the extent at least of such excess, be treated as paid towards the principal. To the question thus stated, the answer, apart from authority, is, to my mind, reasonably plain; it can and should be so treated. Indeed it is difficult to see what other inference is possible in such circumstances; for, the payment being a payment towards the debt must at least to the extent of the excess over the interest due at the date of such payment, necessarily go in reduction of the principal debt. There can be no question of the creditor holding such excess amount in suspense or of his applying

1. (1941) 1 M.L.J. 216.
2. (1940) 2 M.L.J. 648.

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it at his option in reduction of the principal or interest. No question, therefore, of his right to appropriate can arise as regards such sum.

This conclusion receives support from the observations of the Privy Council in *Rama Shah* v. *Lalchand*,[1] as I understand them. Their Lordships had to deal with a question of limitation arising under section 20 of the Limitation Act. The case arose out of a suit on a promissory note brought more than three years after the date of the loan. A payment of Rs. 100 which was much less than either the interest or the principal then due had been made and endorsed on the note within three years, but without indicating whether the payment was towards interest or towards principal. In view of the conflict of decisions in India their Lordships had to construe the section and state their opinion as to its effect in cases of payment thus made generally on account. Referring to their earlier decision in *Hetram Bodhraj* v. *Ayaram Tolaram*,[2] their Lordships point out that, while it showed that the intention of the debtor must be shown to have been that the payment should go towards interest, the case also showed, "that such intention may be proved not only by statements made by him at the time of payment, but in any other manner and may clearly appear from the circumstances of the case". Their Lordships later make it clear that one such circumstance from which the debtor's intention may "clearly appear" is the fact that the amount of payment exceeded the principal or the interest due at the time of the payment, for they observed:

> "Of course a payment may be shown to have been intended by the debtor to go—in part at least—towards the reduction of the principal debt by direct proof or *e.g., by the fact that the amount of payment exceeded the interest then due.*"

In another place their Lordships said,

> "There is no room for the contention that the sum of Rs. 100 exceeded the amount of principal or of interest outstanding in respect of the note at the date of the payment *so that part of it at least must of necessity have been intended to go towards interest or towards principal.*"

These observations and the entire reasoning of their Lordships leave no room for doubt in my mind that, if a question of limitation turned on the payment of Rs. 940 made by the debtor in the present case, it would have to be treated as a part payment of the principal to the extent of Rs. 218, the interest then due being admittedly Rs. 722 only. If so, I fail to see how a different principle can be applied in dealing with the payment in scaling down the debt under section 8 of the Madras Agriculturists' Relief Act. The learned counsel for the appellant conceded that the principle applicable must be the same in either case; but he would say that the decision of the Privy Council does not require that a payment like the one in question must of necessity be treated in part at least as a payment of the principal. It was said that the debtor might not have calculated the interest due at the time of the payment and might not have been aware that he was paying more than such interest. And attention was drawn to the observations at page 485, where their Lordships refer to the possibility of the debtor having intended no appropriation between principal and interest and say that it is a common enough frame of mind when a payment is made generally on account of a debt. The short answer to this argument, however, is that no trace of any suggestion as to the debtor having been unaware that he was paying a sum in excess of the interest then due can be discovered in the record and, in the absence of any such suggestion, there is no reason why the natural inference that the debtor intended the excess sum of Rs. 218 to go towards the principal should not be drawn in the circumstances of this case. But, apart from that, I am unable to read the observations at page 485 as involving a contradiction of what their Lordships stated earlier in their judgment to which reference has been made already. It will be seen that these observations at page 485 were made in criticising the view of the dissenting minority in *Udaypal's case*[3] that

1. (1940) 1 M.L.J. 895: L.R. 67 I.A. 160: I.L.R. 21 Lah. 470 (P.C.).
2. (1937) 42 C.W.N. 509 (P.C.).
3. (1935) I.L.R. 58 All. 261 (F.B.).

a payment on general account must be either a payment of interest as such or a part payment of principal. Their Lordships point out that, "the disjunction is incomplete", there being other possibilities also as to the debtor's intention. These general observations cannot, in my opinion, be taken to apply to the case of a payment of a sum exceeding the interest or principal then due where, as I have already observed there can be no question, as regards such excess, of appropriating it to principal or to interest. The debtor, having paid the amount towards the particular debt, must be taken to have intended that the excess over the interest or principal must go in reduction of the principal or interest, whether or not he was aware that the payment involved such excess. This is what their Lordships would seem to indicate in the earlier portion of their judgment. A debtor who makes a payment on general account while having no intention of appropriation as between interest and principal might well intend that if the payment happens to exceed interest or principal, the excess should go in reduction of the principal or interest. I can see nothing inherently inconsistent or impossible in such a frame of mind.

I may also observe that the view which I have expressed above is shared by Rachpal Singh, J., who was one of the majority Judges whose decision in *Udaypal Singh* v. *Lakhmichand*[1] was approved in *Rama Shah* v. *Lalchand*.[2] The learned Judge put the following case (page 294):

"On the date of payment Rs. 50 are due on a bond on account of principal and Rs. 2 on account of interest. The debtor makes the payment of Rs. 20. In that case the creditor would be right in saying that only Rs. 2 had been paid towards interest and *the balance must be deemed to have been paid towards part payment of the principal.* To such a case the provisions of the second part of section 20 would be clearly applicable. The payment of interest might not enlarge the period of limitation because it was not paid as such, but the payment of the balance would certainly be one towards part payment of the principal, and if the endorsement about it is signed by the debtor or his agent then it will certainly enlarge the period of limitation."

It was however urged for the appellant that our decision in *Duraisami Aiyangar* v. *Raghavachariar*[3] is against this view. We have no doubt held in that case that the effect of section 8 of the Madras Agriculturists' Relief Act being to wipe out all interest outstanding on the 1st October, 1937, on debts due by agriculturists, an "open payment" made before that date cannot be treated as a payment towards interest and as such taken out of the mischief of the section, unless it had been actually appropriated towards interest before that date. We applied the principle of the Privy Council ruling in *Rama Shah's case*[2] that an open payment cannot be treated as a part payment of the principal debt so as to save limitation unless there was an actual appropriation of such payment towards principal within the prescribed period. As in the case of limitation so for purposes of section 8, the appropriation must, we held, be actual and no presumption, based upon the creditor's right to appropriate an open payment in the manner most advantageous to him, could be made so as to defeat the operation of the statute. This is all that was decided in the case referred to above. The point now raised was not put forward and our attention was not even called to the circumstance that the payment there exceeded the interest then due. No doubt on the facts of that case the contention now urged for the respondent could also have been raised and its acceptance would, in working out the figures, have produced a somewhat different result, but it would not affect the general principle which, following the Privy Council decision, we laid down in that case. The view I have expressed on the point now raised would no doubt involve a qualification of that principle when applied to cases of payments in excess of the interest then due, but as a member of

1. (1935) I.L.R. 58 All. 261 (F.B.).
2. (1940) 1 M.L.J. 895: L.R. 67 I.A. 160: I.L.R. 21 Lah. 470 (P.C.).
3. (1940) 2 M.L.J. 648.

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the Bench which decided that case I must protest against being understood to have decided the present point the other way by implication. It may be pointed out in this connection that this point was not of much practical importance until the case in *Narasareddi* v. *Rangareddi*[1] was decided some time later. It may be that even after this decision, there were some cases in which payments in excess of the interest then due were not, in working out the figures in the process of scaling down the debts, dealt with in the manner now suggested for the respondent, as the question was not raised. Such cases have been probably not many and in any case there is no room here, in my opinion, for the application of the principle of *stare decisis* as there has been in fact no decision on the point but only a working out of figures on a wrong basis assumed to be correct in the process of scaling down the debts in some cases.

I would therefore hold that Rs. 218 out of the sum of Rs. 940 paid on 2nd October, 1936, must be taken as having been paid towards the principal of the promissory note, dated 9th June, 1934, and that the suit debt should be scaled down on that basis.

(This second appeal, on reference under section 98 of the Civil Procedure Code, because of the difference of opinion between Wadsworth and Patanjali Sastri, JJ., coming on for hearing, the Court delivered the following)

JUDGMENT.—Defendant in 1931 executed a promissory note for Rs. 1,400 in favour of the plaintiff. This was renewed in June, 1934, for a sum of Rs. 1,806-14-6. Plaintiff sued on this second promissory note. Two payments were made and endorsed upon it, one of Rs. 100 on 1st June, 1935 and one of Rs. 940 on 2nd October, 1936. The endorsements do not show any specific appropriation of these payments towards interest or principal, and the question at issue is how these payments are to be treated in the scaling down of the debt under the provisions of Act IV of 1938. The two lower Courts have held that the plaintiff appropriated these payments before 1st October, 1937, partly to the complete discharge of the interest due when the payments were made, and partly to the principal of the suit promissory note. The second appeal was heard by Wadsworth and Patanjali Sastri, JJ., who have both held that this view is wrong. The learned Judges, however, have differed in another respect, and in consequence of their difference of opinion the appeal has been heard by me.

The conflicting views are these:—

Wadsworth, J., has held that there was no appropriation before 1st October, 1937. The payments must therefore go in reduction of the principal of Rs. 1,400 which was the amount of the original debt. It is not disputed that *if* no appropriation was made before that crucial date, the conclusion is correct.

Patanjali Sastri, J., has held that when the sum of Rs. 940 was paid in 1936, it amounted to considerably more than the interest then due on the promissory note sued upon. To the extent that the payment exceeded the amount of the interest due it was appropriated by the debtor towards the principal of that note. The principal of that note consisted of the original principal of Rs. 1,400 and interest on that Rs. 1,400. According to a decision

1. (1941) 1 M.L.J. 216.

of Wadsworth, J., in *Narasareddi* v. *Rangareddi*,[1] the appropriation by the debtor to the principal of the renewed note must be held to be an appropriation towards the interest on the original principal of Rs. 1,400 so far as that is arithmetically possible. The amount therefore available to be applied in the scaling down to the reduction of the principal of Rs. 1,400 is considerably reduced.

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The real question at issue is thus seen to be one essentially of fact. Did the debtor make any appropriation towards the principal of the suit promissory note, or did he not, at the time he made the payment of Rs. 940? Now what is an appropriation? It is the indication of an intention that money should be applied in a particular way. How can that intention be proved? The most ordinary way of proving it is by proof of a statement made either orally or in writing, and such proof is certainly lacking in this case. But that is not the only kind of proof possible. It may be proved by circumstantial evidence as is recognised in section 60 of the Indian Contract Act, and in a very important decision of the Privy Council *Rama Shah* v. *Lalchand*,[2] which has played a predominant part in the hearing of this appeal. That decision is concerned primarily with the interpretation of section 20 of the Limitation Act, but it was necessary for their Lordships to consider the nature of an appropriation. That they endorse the view that an appropriation may be made in other ways than by explicit statement is clearly indicated by the following passages:

On page 477: "There is no room for the contention that the sum of Rs. 100 exceeded the amount of principal or of interest outstanding in respect of the note at the date of the payment so that part of it at least must of necessity have been intended to go towards interest or towards principal;"

On page 481 (referring to a previous case decided by the Privy Council *Hetram Bodhraj* v. *Ayaram Totaram*[3]), "the case also shows, however, that the intention of the debtor may be proved not only by statements made by him at the time of payment but in any other manner and may clearly appear from the circumstances of the case;" and

On page 482: "Of course a payment may be shown to have been intended by the debtor to go, in part at least, towards the reduction of the principal debt by direct proof or, *e.g.*, by the fact that the amount of the payment exceeded the interest then due."

Now in the present case the defendant paid in 1936, a sum which was greater by several hundreds of rupees than the interest then due. There is nothing to suggest that he did not know the extent of his indebtedness or the amount of interest due, or that he intended only to pay interest and not principal. It seems to me in these circumstances that I can and ought to hold that defendant in 1936 did intend to pay off part of the principal of his debt and indicate that intention by the very act of the payment.

This case would indeed seem to me to present no difficulty at all, but for the fact that in a previous decision Wadsworth and

1. (1941) 1 M.L.J. 216.
2. (1940) 1 M.L.J. 895: L.R. 67 I.A. 160: I.L.R. 21 Lah. 470 (P.C.).
3. (1937) 42 C.W.N. 509 (P.C.).

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Patanjali Sastri, JJ., applied this same judgment of the Privy Council to reach a contrary conclusion and I have now been asked to hold that that previous decision is binding upon me. The decision in question is *Duraiswami Aiyangar* v. *Raghavachariar*.[1] In that case also a payment was made considerably in excess of the amount of interest then due. Their Lordships held that there was no actual appropriation by the creditor or debtor, and therefore the creditor could not be deemed to have made an appropriation favourable to himself. There can be no doubt if I may say so with respect that this conclusion properly follows from the judgment of the Privy Council in *Rama Shah* v. *Lalchand*.[2] But the fact that the *debtor* had made no appropriation was never questioned and indeed was assumed in that case. Further until the decision in *Narasareddi* v. *Rangareddi*[3] was given it would probably have served no practical purpose even to raise the question. The proposition laid down in *Duraiswami Aiyangar* v. *Raghavachariar*[1] is this, that a "notional appropriation" cannot take the place of an "actual appropriation". What I have now to decide is not something which conflicts with that principle of law but whether in the present case there has been an actual appropriation or not. As I have already indicated I agree with the view of Patanjali Sastri, J., that there has been such an actual appropriation.

In the result the decrees of the Courts below must be modified and the plaintiff be given a decree for the sum of Rs. 766-14-6 with interest at 6¼ per cent. from 1st October, 1937. It is agreed by the learned advocates who have appeared before me that this is the correct figure, being based upon the calculations that on the date of payment of the Rs. 940, the interest due on the renewed promissory note was Rs. 408-2-0 and the interest due on the original principal of Rs. 1,400 was Rs. 722. Each side will bear his own costs throughout.

K.S. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

The Hindu Religious Endowments Board, Madras .. *Appellant** (*Defendant*)

v.

Peddinti Sitarama Charyulu .. *Respondent* (*Plaintiff*).

H. R. E. Board, Madras v. Sitarama Charyulu.

Madras Hindu Religious Endowments Act (II of 1927 as amended), sections 60-A and 69—Contribution from trustee—Notice issued in particular fasli—Collection for previous faslis—Permissibility.

The contribution leviable from trustees under section 69 of the Madras Hindu Religious Endowments Act becomes payable only after the Board issues a notice calling upon the trustee to pay the contribution. It is the notice that entitles the Board to levy the contribution. There is nothing in the scheme of the Act to suggest that it was the intention of the Legis-

1. (1940) 2 M.L.J. 648.
2. (1940) 1 M.L.J. 895: L.R. 67 I.A. 160: I.L.R. 21 Lah. 470 (P.C.).
3. (1941) 1 M.L.J. 216.

*S.A. No. 57 of 1941. 29th July, 1942.

H. R. E. Board, Madras v. Sitarama Charyulu.

lature that the levy should be either in the year for which it is levied or in the next year.

Accordingly the Board can recover from the trustees the contribution levied under section 60-A of the Act in respect of the period anterior to the fasli in which the notice as to levy was issued.

Appeal against the decree of the Court of the Subordinate Judge of Amalapuram, dated 13th August, 1940 and passed in A.S. No. 96 of 1938, presented against the decree of the Court of the District Munsiff of Razole, dated 29th August, 1938 and passed in O.S. No. 191 of 1937.

P. V. Rajamannar and *M. Seshachalapathi* for Appellant.

N. Sivaramakrishna Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The defendant, the Hindu Religious Endowments Board, is the appellant and the appeal arises out of a suit filed by the archaka trustee of a temple for an injunction restraining the Board from asserting any right to recover or from recovering any contribution from the temple, as due under section 60-A of the Madras Acts II of 1927 and XI of 1931. The Board claimed a right to collect not only for the current fasli, but also for nine faslis prior to the then current fasli. The first Court dismissed the suit. The appellate Court found that the Board had no power to levy arrears and that it had power only to levy for the current and for the prior fasli. Hence this appeal. The only point for consideration is whether the Board had power to levy the contribution for faslis 1336 and 1344.

The learned Subordinate Judge conceded that there was no period of limitation fixed for recovering contributions and that the contribution was payable only after its levy but he was of opinion that as in this case the levy of contribution was for more than one fasli and for several faslis prior to that in which it was levied it was a capricious and arbitrary act and on the strength of the decision in *Taluk Board, Bandar* v. *Zamindar of Chellapalli*[1] found that the Board was not entitled to so levy. It is conceded for the respondent that the ruling has no application to the facts of this case. As a matter of fact, it has no application to the facts of this case. It cannot be said that the levy of contribution payable by a temple trustee, merely because it happens to be for several faslis prior to that in which it was levied was a capricious or arbitrary act.

It is urged for the respondent that the levy can be made only for the year in which it was levied and not for previous faslis as the Act does not empower the levy of such contributions. It is the absence of any express provision in the Act empowering the Board to levy for the faslis prior to that in which it was levied, that is sought as the basis for the plea of the respondent that the Board has no power to collect arrears, and reliance was placed for this on the decision in *Prince of Arcot* v. *Corporation of Madras*.[2] That was a case of a levy of profession tax for several half years in a particular half year and it was held that

1. (1920) 40 M.L.J. 91: I.L.R. 44 Mad. 156.
2. (1929) 57 M.L.J. 536: I.L.R. 52 Mad. 866.

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the Madras Corporation had no right to levy for such previous half years. This case in question is on all fours with the case in *Gopalaswami* v. *Secretary of State for India*.[1] The contribution leviable from trustees under section 69 of the Act becomes payable only after the Board issues a notice calling upon the trustee to pay the contribution. It is the notice that entitles the Board to levy the contribution. The trustee is given under section 70 one month's time to pay the same. In default of payment the Collector of the District in which that property is situate shall on requisition made to him by the President of the Board recover such amount as if it were arrears of land revenue. The Collector on receipt of such a requisition has to give the trustee fifteen days' notice within which it will be open to the trustee either to pay or submit his objections. The objection will have to be forwarded to the Board and the Board has to pass orders thereon. On receipt of such orders from the Board, the Collector will have to distrain the property and collect the amount. Under the rules framed by the Government the assessment of contribution payable by a temple has to be made for each fasli on the basis of the income realised during the previous fasli. The trustee of the temple has to prepare a statement and submit it to the Board on or before the 30th September. If the trustee fails to make such a return within such time or makes a return which in the opinion of the Board is not correct, the Board may assess the income to the best of its judgment; and that becomes the amount leviable as contribution. Neither in the Act, nor in the rules is it stated that the contribution should be levied either for that fasli in which it was levied or for the previous fasli. There is no time limit for the levy of contribution. The case in *Gopalaswami* v. *Secretary of State for India*[1] was a case of a levy of duty under the Cotton Duties Act. Under that Act, the duty was payable monthly and the manufacturer had to submit in the beginning of each month the value of the articles manufactured by him in the previous month and the levy should be made on the amount shown in that return. Of course, it was open to the Collector also to revise it or to fix his own value of the articles manufactured, if he found it not satisfactory. The provision as regards the levy and the provision as regards the person who has to initiate the levy are similar in that case also. The plaintiff in that case started the factory in 1913 and it was only in February, 1923, ten years later, that the Revenue Divisional Officer, called upon the plaintiff to submit the return and subsequently passed orders assessing the goods produced in the factory from its establishment up to the end of 1922. The plaintiff contended that he was not bound to pay the arrears and that the revenue authorities had no power to collect the arrears of duty over a period of years and their Lordships held that since the Act was silent as to the period for which the levy could be made the authorities were justified in levying the duty payable from the date of the establishment though the levy was nearly ten years later. The decision in *Prince of Arcot* v. *Corporation of Madras*[2] was cited before

1. (1933) 65 M.L.J. 518: I.L.R. 57 Mad. 237.
2. (1929) 57 M.L.J. 536: I.L.R. 52 Mad. 866.

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their Lordships and this is how their Lordships distinguish that case from the facts of the case before them:

"We have been asked to find another analogy in the payment of profession tax under the Madras City Municipal Act (IV of 1919) and some reliance has been placed upon the *Prince of Arcot* v. *Corporation of Madras*,[1] which deals with a case arising under that Act. In respect of an allowance received from Government, the Commissioner of the Corporation assessed the Prince of Arcot to profession tax in September, 1926, for the ten half years commencing from the second half year of 1920-21 and the question arose whether this assessment could be made so as to comprise such arrears. The answer given by the Bench was in the negative, the scheme of the Act requiring that the assessment must be made during the period to which it relates.''

I do not think I can distinguish the facts of this case in better language than how it was distinguished by their Lordships in the case quoted above. There is nothing in the scheme of the Hindu Religious Endowments Act to suggest that it was the intention of the Legislature that the levy should be either in the year for which it is levied or in the next year. I am not able to see any hardship to the institution by the delaying of such levies; for it is their default in sending the returns that resulted in the contribution not being levied. As pointed out in the case in *Gopalaswami* v. *Secretary of State*,[2] the person who had to initiate the proceedings before contribution could be levied was the temple and when it did not send the return and remind the Board of the fact that it was liable to pay contribution, it would have to thank its own stars, and I do not think any consideration of hardship will justify an interpretation which would deny the Board of its right to levy the contributions due to it.

I therefore find that the learned Subordinate Judge was wrong in having found that the Board had no right to levy the contribution payable for faslis 1336 to 1344. In the result the second appeal is allowed and the decree of the lower appellate Court is set aside and the suit dismissed with costs in all the three Courts. Leave to appeal is refused.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

K. Nataraja Gramani .. *Petitioner** (*Respt.-1st Deft.*)

v.

Sivakolundu Gramani .. *Respondent* (*Plff.-Applt.*).

Nataraja Gramani v. Sivakolundu Gramani.

*Madras Agriculturists' Relief Act (IV of 1938), sections 20 and 19—Stay under—*Ad interim *stay followed by an absolute order—Not permissible—Starting point of limitation for filing application under section 19.*

The procedure of an executing Court in granting an *ad interim* stay followed by an absolute order is not contemplated by section 20 of Act IV of 1938; when once a stay has been granted limitation for an application under section 19 will begin to run.

However, the order of the trial Court is not one without jurisdiction merely because it proceeds on a different view of the limitation question.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District

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1. (1929) 57 M.L.J. 536: I.L.R. 52 Mad. 866.
2. (1933) 65 M.L.J. 518: I.L.R. 57 Mad. 237.

*C.R.P. No. 1552 of 1940. 27th August, 1942.

Nataraja Gramani v. Sivakolundu Gramani.

Court of Chingleput, dated 6th February, 1940 and made in A.S. No. 347 of 1938, preferred against the Order of the Court of the Subordinate Judge of Chingleput, dated 20th September, 1938 and made in M.P. No. 321 of 1938 in O.S. No. 29 of 1936.

R. Thirumalai Thathachariar for Petitioner.

M. Ranganatha Sastri for Respondent.

The Court delivered the following

JUDGMENT.—The appeal to the District Judge against the order of the Subordinate Judge was incompetent and the appellate order has to be set aside. I am asked in revision to rectify what appears to be an erroneous decision on the limitation question by the trial Court. While I am of opinion that the procedure of the executing Court in granting an *ad interim* stay followed by an absolute order is not contemplated by section 20 of Act IV of 1938 and that when once a stay has been granted limitation for an application under section 19 will begin to run, I am not prepared to hold that the decision of the learned Subordinate Judge was without jurisdiction because it proceeds on a different view of the limitation question. In the result the revision petition is allowed with costs here and in the District Court and the order of the Subordinate Judge is restored.

K.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

Thatiparthi Krishna Reddi and others .. *Appellants**
(*Plffs.* 2, 4 *and* 5)

v.

Ambarkhana Jayarama Rao and others .. *Respondents*
(*Defts.* 1, 3, 5 *and* 3*rd Plff.*).

Krishna Reddi v. Jayarama Rao.

Limitation Act (IX of 1908), section 7—Applicability—Decree in favour of major and minor sons of deceased plaintiff—Execution petition—Saving of limitation in favour of minors—Effect of Order 32, rule 6, Civil Procedure Code (1908).

The suit was on a mortgage in which the preliminary decree was passed in December, 1928. There was an appeal preferred to the High Court, but the same was dismissed and the decree of the lower Court was confirmed in November, 1932. In the meanwhile, a final decree had been passed in August, 1932, by the lower Court and even before that date the original plaintiff died and in his place his sons were brought on the record as legal representatives. His sons were four in number of whom the elder two were majors and the younger two were minors and the decree was in favour of all of them, the minors being represented by the eldest son as next friend. The first execution petition was filed in August, 1935, but it was returned for remedying some defects which were never remedied and was therefore rejected. The decree-holders, namely, the sons of the original plaintiff, then filed an execution petition in November, 1938. In order to save limitation the decree-holders contended that the execution of the decree was not barred inasmuch as two of the decree-holders were minors and their next friend was not competent to give a discharge within the meaning of section 7 of the Limitation Act.

Held, that under Order 32, rule 6, Civil Procedure Code, the next friend was not competent to give a discharge in respect of the decree and that

*A.A.O. No. 54 of 1941. 25th September, 1942.

Krishna Reddi v. Jayarama Rao.

limitation in respect of the execution petition was saved under section 7 of the Limitation Act.

Lakshmanan Chetty v. *Subbiah Chetty*, (1924) 47 M.L.J. 389: I.L.R. 47 M. 920, relied on.

Venkatakrishnayya v. *China Kanakayya*, (1938) 1 M.L.J. 775: I.L.R. (1938) M. 819 (F.B.), considered.

Appeal against the order of the Court of the Subordinate Judge of Nellore, dated 29th January, 1940 and made in E.P. No. 7 of 1939 in O.S. No. 4 of 1928.

K. Umamaheswaram for Appellants.

V. Suryanarayana and *B. V. Ramanarasu* for Respondents.

The Judgment of the Court was delivered by

Krishnaswami Ayyangar, J.

Krishnaswami Ayyangar, J.—The only point that arises for consideration in the appeal is whether the learned Judge in the Court below was right in dismissing the execution petition E.P. No. 7 of 1939 as barred by limitation. The suit was on a mortgage in which the preliminary decree was passed on 11th December, 1928. There was an appeal preferred to this Court from that decree in A.S. No. 212 of 1929, but the appeal was dismissed and the decree of the Court below was confirmed on 11th November, 1932. In the meanwhile, a final decree had been passed on 19th August, 1932, by the lower Court. Even before that date, however, the original plaintiff Venkatasubba Reddi died and in his place his sons were brought on the record as legal representatives. His sons were four in number of whom the elder two were majors and the younger two were minors and the decree was in favour of all of them, the minors being represented by the eldest son as next friend. The first execution petition was filed on 12th August, 1935, but it was returned for remedying some defects which were never properly remedied and was therefore rejected. It is not suggested that this order is capable of saving limitation. The decree-holders, the sons of Venkatasubba Reddi, then filed the present execution petition, E.P. No. 7 of 1939 on 20th November, 1938. The petition having been filed more than three years after the date of the judgment of the High Court on 11th November, 1932, is *prima facie* barred by limitation. The contention of the decree-holders in the Court below was that execution of the decree was not barred, inasmuch as two of the decree-holders were minors and their next friend was not competent to give a discharge within the meaning of section 7 of the Indian Limitation Act. This contention was not upheld and the Subordinate Judge accordingly dismissed the execution petition. The decree-holders have therefore preferred this appeal.

The learned Judge has not in his judgment considered the bearing of Order 32, rule 6 of the Code of Civil Procedure on the point of limitation raised before him nor does it appear that his attention was called to the decided cases which have interpreted this rule. In *Lakshmanan Chetti* v. *Subbiah Chetti*[1] a Division Bench of this Court (Coutts-Trotter, C.J. and Ramesam, J.) had occasion to consider the effect of Order 32, rule 6 in the light

1. (1924) 47 M.L.J. 389: I.L.R. 47 Mad. 920.

Krishna Reddi v. Jayarama Rao.

Krishnaswami Ayyangar, J.

of the decision of the Privy Council in *Ganesh Rao* v. *Tuljaram Rao*.[1] There a Hindu father and his three minor sons represented by him as the next friend, had obtained a joint decree on 16th October, 1913. The father having died two months after the decree, his eldest son applied for the execution of the decree by a petition filed on 3rd December, 1917, which was within three years of his majority, but more than three years after the date of the decree. If the father was in a position to give a legal and valid discharge of the decree without leave of the Court obtained under Order 32, rule 6, the decree would have been barred by limitation. The Court was therefore called upon to consider the effect of section 7 of the Indian Limitation Act in relation to decrees obtained on behalf of minors and falling under the purview of Order 32, rule 6. The Court decided that the father though the natural guardian, was not competent to give a discharge in respect of the decree as it had been obtained by him on behalf of his sons and as their next friend or guardian. In coming to this conclusion the learned Judges merely applied the rule of law laid down by the Privy Council in the case of *Ganesh Rao* v. *Tuljaram Rao*.[1] Though the father might be the natural guardian, his power to act on behalf of minors represented by himself in a suit, was held to be controlled by the provisions of law contained in Order 32, rule 6, as he cannot do any act in his capacity as father or managing member, which he was debarred from doing as next friend or guardian without leave of the Court. It is conceded by Mr. Suryanarayana who appears for the respondents that this decision is directly against him and if right the appellants were entitled to succeed. But he contends that it has been overruled, in effect though not expressly, by the Full Bench decision of this Court in *Venkatakrishnayya* v. *China Kanakayya*.[2] The Full Bench was not called upon to deal with the principle underlying Order 32, rule 6 at all. What happened in the case then before the Court was this. A decree had been obtained in favour of two minors represented by their mother and that decree was subsequently transferred to a third party by the mother acting as the guardian of the property of the minors. The question was whether the transfer was valid and the transferee was entitled to be brought upon the record in the place of the decree-holders and be allowed to execute the decree. The Full Bench held he was. The judgment of the Court proceeded upon a construction of Order 32, rule 7 relating to the power of the next friend or a guardian to enter into an agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. The learned Chief Justice pointed out that the transfer of a decree by a mother of the minors was something entirely outside the suit and her powers as natural guardian were accordingly not in any way limited by the rule. But that is not the position here. The question is whether the next friend has the right to give a discharge with respect to the

1. (1913) 25 M.L.J. 150: L.R. 40 I.A. 132: I.L.R. 36 Mad. 295 (P.C.).
2. (1938) 1 M.L.J. 775: I.L.R. (1938) Mad. 819 (F.B.).

decree itself with reference to the parties to the suit. In *Ramalingam Chetti* v. *Radhakrishna Chetti*,[1] which is also relied upon for the respondents, the facts were totally different. The question was whether the father or manager in a joint Hindu family is entitled to receive the amount of a decree and to give a discharge so as to bind a minor member of the family who is a party to the suit without obtaining the leave of the Court *where such father or managing member was not the next friend.* The position would of course be different if the question had been whether the guardian himself could give a discharge even though he possessed the additional capacity of the father or manager of the family. We are of opinion that this case is governed by *Lakshmanan Chetty* v. *Subbiah Chetty*,[2] which has not been in our opinion shaken in any way by the Full Bench decision in *Venkatakrishnayya* v. *China Kanakayya*.[3]

That being so, the appeal must be allowed and the case sent back. The Subordinate Judge will restore the execution petition and proceed to dispose of it according to law. The appellants are entitled to the costs of this appeal.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Ranga Aiyar .. *Petitioner** (*2nd Respt.*)

v.

Lingappa Gounder's son, Subbayya Gounder and others .. *Respondents* (*Petr.-1st Respt.*).

Madras Agriculturists' Relief Act (IV of 1938), section 15—Malabar Tenancy Act (XIV of 1930), section 3 (j)—Terms 'tenant' and 'intermediary' explained—Usufructuary mortgagee from a jenmi—Attornment by tenant to him of interest—Rent—Benefits of the Act whether available against him by reason of his petition as an 'intermediary'.

An usufructuary mortgage of a Malabar *jenmi's* right creates in the mortgagee an interest which entitles him to possession, and where the tenant has attorned to him, he must be deemed to have transferred such possession to the tenant. He is therefore an intermediary and the tenant is entitled to the benefits of section 15 of Act IV of 1938 with reference to the rent payable to him.

Terms "tenant" and "intermediary" in the Malabar Tenancy Act explained.

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the orders of the Court of the District Munsiff of Palghat, dated 4th May, 1939 and made in O.Ps. Nos. 237 and 238 of 1938, respectively.

P. S. Narayanaswami Aiyar for Petitioner.

K. Kunhikrishna Nair, A. P. Kuttisankara Nair and *C. Unikanda Menon* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner here was the second respondent in the lower Court. The petitions arise out of an application by

1. (1935) 70 M.L.J. 700.
2. (1924) 47 M.L.J. 389: I.L.R. 47 Mad. 920.
3. (1938) 1 M.L.J. 775: I.L.R. (1938) Mad. 819 (F.B.).

*C.R.P. Nos. 669 and 670 of 1940. 7th October, 1942.

Ranga Aiyar v. Subbayya Gounder.

a tenant under section 15 of Madras Act IV of 1938 to scale down rent due under a perpetual lease of the kind known as *saswatham* in Malabar. The jenmi of the land was the first respondent in the lower Court. The petitioner here is a usufructuary mortgagee from the jenmi and it is common ground that the tenant has attorned to him and the rent is payable to him. The lower Court held that the deposit made by the tenant of the arrears for the Malabar year 1113 could be accepted under section 15 in order to entitle the petitioner to a proportionate reduction of the arrears for earlier years.

It is objected in revision, firstly, that the usufructuary mortgagee is neither a jenmi nor an intermediary and therefore the rent payable to him cannot be scaled down under section 15 of the Act, secondly, that whatever be the position with reference to an ordinary lessee under a usufructuary mortgagee, rent payable under a perpetual lease to such a mortgagee cannot be scaled down.

The first contention challenges the correctness of the decision of one of us in C.R.P. No. 430 of 1940. That was a case in which the rent was payable by kanomdars who had attorned to a usufructuary mortgagee of the jenmi's right. It was held that the mortgagee was an intermediary, being entitled to possession by reason of an interest in land and having constructively transferred such possession to the kanomdars who had attorned to her. It is suggested that the words "has transferred possession to others" in the definition of "intermediary" in section 3 (*j*) of the Malabar Tenancy Act can only refer to the person who has himself for the first time parted with possession in favour of others and would not include the case of a person who had constructively transferred possession by reason of an assignment from the original lessor and an attornment from a tenant. We are of opinion that such an interpretation of the definition is not in harmony with the scheme of the Malabar Tenancy Act. Particularly, it would make the provisions of section 26 of that Act to a large extent ineffective for, in a great many cases, the intermediate holder of the land would not be the original lessor but the heir or assignee of the original lessor. We are of opinion that the words "has transferred possession to others" must be read so as to include the person who stands in the shoes of the original transferee and to whom the tenant has attorned.

It was suggested that though the definition would include a transferee from the kanomdar who pays rent to the jenmi and collects rent from a subordinate tenant, it would not include a transferee from the jenmi himself. The argument is that the term "intermediary" etymologically contemplates a sort of middleman who himself receives rent and pays rent to a higher landlord. That is nothing in the definition to warrant the conclusion that a payment of rent by the intermediary is a necessary qualification. No doubt the definition of "tenant" includes an intermediary, but from this fact we are not prepared to infer that an intermediary must necessarily be a person who himself pays rent. The term "tenant" in the Malabar Tenancy Act is

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used in a very wide sense and it is only certain specific classes of tenants who are entitled to renewals or fixity of tenure in certain specified circumstances. Though no doubt, in the vast majority of cases the intermediary will be a person who both receives and pays rent, we are not prepared to hold that the payment of rent is a necessary qualification for inclusion within the definition of that term. We are therefore of opinion that C.R.P. No. 430 of 1940 was rightly decided and that in the ordinary case of a terminable tenancy where the usufructuary mortgagee has not himself granted the lease but has taken an attornment from the tenant, he must be deemed to be a person who, by reason of an interest in land, is entitled to possession, but has transferred such possession to others.

It remains to be seen whether the usufructuary mortgagee can be regarded as an intermediary when the tenant who has attorned to him holds under a perpetual lease granted by the jenmi. The argument is that the mortgagee is not entitled to possession of the land itself when that land has already been given on perpetual lease; therefore, though he may, on the reasoning of the decision already quoted, be deemed to have transferred possession to the perpetual lessee, he cannot be deemed to be entitled to possession by reason of his interest in the land. In any case where the land is held on lease by a cultivating tenant, the right to possession of the intermediary would only be on termination of the lease. There are several subordinate tenures contemplated in the Malabar Tenancy Act which are either permanent or capable of renewal at the will of the tenant. It would be a serious matter to hold that the subordinate landlord is not an intermediary unless his interest in the land entitles him to possession at some specified date. It is not, we think, correct to hold that, when there is a perpetual lease, the lessor is in no circumstances entitled to possession. He might become entitled to possession by surrender, or by forfeiture on the tenant denying the landlord's title, possibly also in other circumstances which we need not specify. It, therefore, appears to us that even under a perpetual lease there is existing a right of reversion, though it may not become effective except in unusual circumstances. That being so, we are constrained to hold that the usufructuary mortgage of the jenmi's right creates in the mortgagee an interest which entitles him to possession and that by reason of the attornment of the tenant to him, he must be deemed to have transferred such possession to the tenant. He is therefore an intermediary and the tenant is entitled to the benefits of section 15 of Act IV of 1938 with reference to the rent.

The civil revision petitions are therefore dismissed with costs of the first respondent; one advocate's fee.

K.C. ——— *Petitions dismissed.*

Bala-venkatarama Chettiar v. Marutha-muthu Chettiar.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

P. Balavenkatarama Chettiar and others .. *Appellants**
(Defts. and L. Rs. of the 1st Deft.)

v.

Maruthamuthu Chettiar and another .. *Respondents*
(Plff. and 3rd Deft.).

Negotiable Instruments Act (XXVI of 1881), section 28—Trustees executing promissory note—Whether personal liability excluded.

Section 28 of the Negotiable Instruments Act provides that it is open to the person signing as agent to exclude his personal responsibility by appropriate words indicating that he does not intend thereby to incur such liability. But in the case of a trustee or manager of a charity borrowing money on a promissory note, the undertaking to pay which such execution necessarily imports can be ascribed to the executant, as there is no principal who can be bound by such undertaking. It is difficult to see how such a person can borrow on a promissory note without incurring thereby personal liability. To attribute to the parties in such cases an intention to exclude personal liability of the executant would in effect be to nullify the unconditional undertaking contained in the instrument.

Palaniappa Chettiar v. *Shanmugam Chettiar,* (1918) 35 M.L.J. 90: I.L.R. 41 M. 815, followed.

Appeal against the decree of the District Court of Coimbatore, dated 22nd August, 1938 and made in A.S. No. 291 of 1937 preferred against the decree of the Court of the District Munsiff of Coimbatore in O.S. No. 93 of 1936, etc.

B. V. Visvanatha Aiyar for Appellants.

S. Nagaraja Aiyar, S. Ramachandra Aiyar, J. R. Alwar Naidu and *M. Krishna Bharathi* for Respondents.

The Court delivered the following

JUDGMENT.—These second appeals arise out of three suits brought for amounts due respectively on three promissory notes. Two of them, O.S. Nos. 92 and 93 of 1936, were tried together and dismissed by the trial Court. The other O.S. No. 260 of 1937 was decreed. On appeal to the lower Court, the first respondent succeeded in obtaining decrees in all the suits. It may be mentioned here that in O.S. No. 260 of 1937 out of which S.A. No. 765 of 1939 arises the respondent also sought a decree against the temple of which the defendants who executed the promissory notes were trustees at the time of such execution, but this part of the claim was dismissed in both the Courts below and no question now arises with reference to it.

The promissory notes on which the two earlier suits were brought contained no reference to the trusteeship of the executants and the amounts were stated to have been borrowed "for expenses in connection with our trade". It appears however that the first respondent knew that they were the trustees of the temple and borrowed the amounts for the purposes of the temple. The learned District Munsiff found that though the executants did not sign their names as trustees of the temple, they were induced to execute the notes upon the belief that the temple

*S.A. Nos. 763, 764 and 765 of 1939 and C.M.P. Nos. 544 and 545 of 1942. 5th March, 1942.

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alone would be made liable, and held that they were protected from personal liability under section 28 of the Negotiable Instruments Act. The learned District Judge who refers to this finding of the trial Court does not say whether or not he agrees with it. But he held in all the cases following the decision of this Court in *Palaniappa Chettiar* v. *Shanmugam Chettiar*[1] that section 28 of the Negotiable Instruments Act could have no application to promissory notes executed by trustees and accordingly passed decrees against those defendants personally who executed the notes and against the joint family properties in their hands including the shares of their sons who were also impleaded in the suits.

Mr. Rajah Aiyar for the appellants contended that though section 28 did not in terms cover promissory notes executed by trustees, the principle underlying the provision applied to such cases and that therefore the learned District Judge should have recorded a finding on the question whether the executants were induced to sign the instruments upon the belief that the temple alone would be held liable, as a finding on that point in favour of the executants would absolve them from personal liability on the notes. In the other appeal S.A. No. 765 of 1939 his contention was that in the promissory note there in question the executants having described themselves in the preamble as "managers of Sri Kannika Parameswari Devasthanam", there was sufficient indication, according to the recent Full Bench decision of this Court in *Sivagurunatha* v. *Padmavathi*,[2] dealing with a case under section 28, that they did not intend to incur personal liability. It will thus be seen that in all the appeals the main point for determination is whether section 28 of the Negotiable Instruments Act or the principle on which it is said to be based is applicable to promissory notes executed by persons as trustees or managers of a temple.

It is plain that section 28 deals only with the liability of agents executing promissory notes and does not in terms refer to trustees signing such instruments, but it is urged that the section is based upon a principle of wider application, namely, that a person can, by indicating on the instrument that he is signing only in a representative character exclude his personal responsibility, and that if a trustee accordingly uses appropriate language in a promissory note to indicate that he is executing it only as trustee he will not be personally liable on the note. I find it difficult to accept this contention. It has to be remembered that a promissory note is an unconditional undertaking to pay a certain sum of money and when such an instrument is given it necessarily involves a promise to pay by or on behalf of some person who is capable of binding himself by such promise. When a duly authorised agent executes the note in the name of the principal, the principal is of course the person bound by the unconditional undertaking to pay, and section 28 provides that it is open to the person signing as agent to exclude his personal responsi-

1. (1918) 35 M.L.J. 90: I.L.R. 41 Mad. 815.
2. (1941) 1 M.L.J. 441: I.L.R. (1941) Mad. 513 (F.B.).

Bala-venkatarama Chettiar v. Marutha-muthu Chettiar.

bility by appropriate words indicating that he does not intend thereby to incur such liability. But in the case of a trustee or manager of a charity borrowing money on a promissory note, the undertaking to pay which such execution necessarily imports can be imputed only to the executant, as there is no principal who can be bound by such undertaking, and it is difficult to see how such a person can borrow on a promissory note without incurring thereby personal liability. To attribute to the parties in such cases an intention to exclude the personal liability of the executant would in effect be to nullify the unconditional undertaking contained in the instrument. Hence it is, I apprehend, that Courts have always inclined to the view that trustees or managers borrowing money on promissory notes incur personal liability, and, in fact, Mr. Rajah Aiyar was unable to bring to my notice any case where a trustee executing a promissory note was held not liable personally. On the other hand, the decision in *Palaniappa Chettiar* v. *Shanmugam Chettiar*[1] relied on for the respondent supports the view that a person making a note as trustee of a temple or other charity cannot claim the benefit of section 28 as he cannot be said to be acting on behalf of a person capable of being bound by the undertaking or promise to pay. This decision has never been questioned and I have no hesitation in following it.

As the appellants have applied for relief under Madras Act IV of 1938 and the claim is contested the applications C.M.P. Nos. 544 and 545 of 1942 will be sent to the trial Court for enquiry and report, and final orders will be passed in S.A. Nos. 763 and 764 of 1939 on receipt of such report. S.A. No. 765 of 1939 is dismissed with costs of the 1st respondent. Leave refused.

S.A. No. 765 *of* 1939 *dismissed.*

K.C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Khan Sahib K. Kunhammed Koya .. *Appellant** *(2nd Respt.)*

v.

Mullasseri Gopala Menon and another .. *Respondents* *(Petr. and 1st Respt.).*

Kunhammed Koya v. Gopala Monon.

Malabar Tenancy Act (XIV of 1930), *section* 3 (g)—"*Garden land*"—*Plot principally used for residential purposes—Plantain and cocoanut trees on land—Plot whether constitutes garden land.*

In deciding the question whether a particular plot of land is "garden land" within the meaning of section 3 (*g*) of the Malabar Tenancy Act, the test is whether it was used principally for growing fruit-bearing trees, and the principal user of the land as a whole is the test. Where in a plot which was principally used as a residential house there were twenty-one plantain trees, seven old cocoanut trees and one murunga tree,

Held, that the plot could not be said to be used principally for growing fruit-bearing trees and was not "garden land" within the meaning of section 3 (*g*) of the Malabar Tenancy Act.

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1. (1918) 35 M.L.J. 90: I.L.R. 41 Mad. 815.

*S.A. No. 938 of 1940. 8th July, 1942.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal Suit No. 22 of 1940 preferred against the order of the Court of the District Munsiff of Calicut, dated 22nd day of December, 1938 and made in O.P. No. 99 of 1937.

Kunhammed Koya *v.* Gopala Menon.

B. Sitarama Rao and *S. R. Subramanian* for Appellant.

K. P. Ramakrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal arises out of O.P. No. 99 of 1937 which was filed in the District Munsiff's Court of Calicut under sections 22 and 23 of the Malabar Tenancy Act. The first respondent in this appeal filed the petition asking that a renewal of a prior demise may be directed. The lands belong in jenmam to the Patinhare Kovilakam and were demised on kanom tenure to the first respondent by a registered deed, dated the 8th August, 1923. The term of that kanom expired on 8th August, 1935. The appellant obtained a melcharth from the second respondent on the 23rd March, 1937 and called upon the first respondent to deliver possession of the properties on receipt of the kanom amount and the value of the improvements. The demand not having been complied with, O.S. No. 482 of 1937 was filed by the appellant seeking to recover the suit properties from the first respondent. In order to non-suit the plaintiff, O.P. No. 99 of 1937 was filed asking for a compulsory renewal under the provisions of the Malabar Tenancy Act. Both the lower Courts allowed the petition on certain terms. This appeal is filed attacking the decision of the Courts below that the first respondent is entitled to a renewal under the Act.

Exhibit A is the document under which the first respondent got the property on demise from the second respondent Kovilakam. Ex. I is the corresponding kaichit or counter-part.

The relevant sections of the Act which have a bearing on this question are sections 23 and 17. Section 17 says that a kanomdar shall, on the expiry of the kanom under which he holds, be entitled to claim and his immediate landlord shall be bound to grant a renewal on certain terms. Clause (*c*), sub-clause (2) of the section provides that nothing in the section shall apply to a kanom where all the lands covered by the kanom are dry lands. The point taken in this case is that all the lands comprised in Exs. A and I are dry lands and that, therefore, no renewal can be ordered. Section 3 (*d*) defines the expression dry land as meaning "a land which is neither a wet land nor a garden land". Wet land is defined in section 3, clause (*x*) as land which is adapted for the cultivation of paddy. It is admitted in this case that none of the lands comes under the definition of wet land. The expression "garden land" is defined in clause (*g*) of section 3 as meaning "any land used principally for growing fruit-bearing trees". It is contended that some of the lands covered by Exs. A and I are garden lands within the meaning of section 3 (*g*) and that is the only point which arises for consideration.

The lower appellate Court relied upon earlier documents of 1899 (Ex. F-10) and 1889 (Ex. F-3) to show that some of

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the lands are garden lands. It is said that those documents disclose that on the dates of those documents the lands were garden lands and the argument is that the land has not ceased to be a garden land. In my opinion these documents are entirely irrelevant and ought not to have been looked into. We are not concerned with the question as to what use the properties were put to in 1889 and 1899. The only question is whether in 1923, the date of Exs. A and I, the properties or any of them were garden lands. Nearly 25 years had elapsed from the date of Ex. F-10 and nearly 35 years from the date of Ex. F-3. The Court is not entitled to draw any inference from the state of things that existed a quarter of century and more prior to the date of the suit demise. It is this consideration that has vitiated the judgment of the lower appellate Court and I have to consider whether, apart from Exs. F-3 and F-10, there is sufficient evidence to show that any of the lands was a garden land as defined by section 3 (*g*) on the dates of Exs. A and I.

Turning to Ex. A itself we find as many as six items covered by the document. The schedule attached to Ex. A gives the description of the various items. There is also a sketch showing the location of the various plots. Plot 1 is described to be a paramba on which a five-chambered shop building stands. It is about 57 ft. by 18 ft. The second is a plot 10½ ft. by 12 ft. and is described to consist of one-chambered shop. I shall deal with item 3 later. Item 4 is described as an one-chambered shop measuring 9 ft. by 9 ft. Item 5 is described as the one-chambered shop building 12 ft. by 9 ft. and item 6 is a shop site consisting of two plots one 13½ ft. by 15 ft. and the other 6 ft. by 4½ ft. It is not contended that any of these items comes within the definition of garden land. It is only as regards item 3 that there is the dispute. Item 3 is described thus:

> "The poovanthazhum paramba attached to the above decree thirteen by fourteen and three-fourths. Comprised in Survey No. 292 (10) the description in the A register is as poovanthazhum paramba, etc.,"

and is said to measure 78 ft. by 88½ ft. A Commissioner was appointed to make a local inspection and to report upon the physical features of the various plots. His plan is Ex. G and his report is Ex. G-1. With respect to all the plots except item 3 his report shows that they cannot possibly be termed garden lands. As regards item 3 he has noted that it is an irregular shaped plot. In Ex. G, the plan submitted by him, he marked the various portions of this plot with the letters G, H, K, L, M, N, O, P, Q, R. There is a well in the plot marked H. As noted by him plot H is a house let to a tenant Pappammal. It is a fairly big house as is seen from the plan with a frontage on the eastern and western sides. G is described as an irregular plot cemented over and raised up one foot from the ground and used for drying things. One portion of N in the west is described to be a yard into which the front door of house H opens. Plot K is described to be a cemented yard in the eastern front of the house. M is said to be a vacant space to the east of the plot K. The Commissioner says that between K and M there is a stone bund mark-

ed in the plan nearly a foot higher than K. A door from R. S. No. 292 Chandukunhan's shop opens into this space M. In M stands one cocoanut tree numbered 3 and aged 45 years. L is said to be a thatched shed used as a shop, J a tiny thara or a raised platform or basement occupying a very little space. Plot N is the irregular space as is seen from the sketch and is said to contain six cocoanut trees all fifty years old. R again is the house of Pappammal. P is a cow-shed. O is a fuel shed. Q is a latrine. Then come the following remarks: "The measurements of all the buildings and the sheds as given in the plan are in feet and the scale is 6 ft. for one inch. The suit items and plots are marked in colours for easy reference. Surrounding the fuel shed and latrine, are about 21 plantain trees in that portion of the plot N marked in the plan by stars . . . . . Seven cocoanut trees and one murunga tree and 21 plantain trees stand in suit property item No. III." The last paragraph is a summary of what has gone before. Altogether therefore there were seven cocoanut trees of which six are stated to be 50 years old and one 45 years old. One cocoanut tree is in plot M and six are in plot N. A few plantain trees are in the south-western corner of this plot. On these materials I consider it impossible to sustain the conclusion of the lower Court that the plot 3 as a whole satisfies the terms of section 3 (*g*). It will be noted that section 3 (*g*) requires that the land should be *used principally for growing fruit-bearing trees.* It is clear that so far as the cocoanut trees are concerned they were all planted more than 45 years ago and having regard to the large area of plot 3, the number of the trees is negligible. No cocoanut trees have been planted during the last 45 years. The plantain trees are 21 in number. In a plot which is principally used as a residential house, there are always a few plantain trees and a few cocoanut trees and it will be preposterous to say that the whole plot including the building is used principally for growing fruit-bearing trees. If it is the principal user that is to be regarded, the plot as a whole is principally used for residential purposes. The twenty-one plantain trees, the seven cocoanut trees and the one murunga tree are there for the better convenience of the residential house. It is common experience even in Madras where there is not plenty of water as on the west coast to find in residential houses with compounds, a few plantain trees, a few cocoanut trees and some murunga trees. It will be a misuse of the language to say that the plot as a whole is used principally for growing fruit-bearing trees. In the west coast where there is plenty of water and scarcely any house without a compound, there will always be a few trees of this description and if the view urged by the respondent is accepted, every house and every residential building in which there are a few cocoanut trees or a few plantain trees must be held to be lands principally used for growing fruit-bearing trees and therefore garden lands. I think such a conclusion is impossible. The Courts below were led away by what I have held to be an irrelevant consideration, *viz.*, that in 1889 or 1899 a portion of these lands was let out to the then tenant under terms which, in the opinion of the Courts below, show that it was then a

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garden land. It is not clear how the state of things at that time would enable one to say that it was even then a garden land. Even in 1899 there were, in addition to the buildings, twelve cocoanut trees, three areca, one jack and one paraka tree. It would be very difficult to say with that state of things, the land could properly be termed garden land even in 1899.

But as I said that is entirely irrelevant for considering whether in 1923 when the land was demised under Ex. A it was a garden land, *i.e.*, whether it was used principally for growing fruit-bearing trees. The principal user of the land as a whole is the test. I reverse the decrees of the lower Courts and dismiss O.P. No. 99 of 1937 with costs throughout. The result will be that O.S. No. 482 of 1937 will stand revived and it should be tried on the other questions that arise in the case and appropriate reliefs passed after taking evidence.

No leave.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUNHI RAMAN.

V. Ramaswami Aiyangar and another .. *Petitioners** (*Plffs.*)

v.

Doraisami Vandayar .. *Respondent* (*Deft.*).

Ramaswami Aiyangar v. Doraisami Vandayar.

Indian Succession Act (XXXIX of 1925), *section* 214 (1) (a)—*Receivers appointed by Court with express authority to sue, filing suits for recovery of debts due to estate—Whether certificate of succession necessary.*

In suits by receivers appointed in a litigation that arose after the death of a person with express authority to sue in their own names and realise the outstandings due to the estate of the deceased,

Held, that in view of the wording of section 214 (1) (*a*) of the Indian Succession Act it was not necessary that the receivers should produce succession certificates before they can get decrees passed in their favour on proving their respective claims.

Harihar Mukerji v. *Harendra Nath Mukerji*, (1910) I.L.R. 37 Cal. 754, followed.

Petitions under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Mayavaram, dated 30th day of November, 1940 and made in S.C.S. No. 264 of 1939, etc.

V. Ramaswami Aiyar for Petitioners.

The Government Pleader (*K. Kuttikrishna Menon*), *K. Srinivasa Rao* and *K. R. Subramania Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—In these cases the only question of law that arises for consideration is whether it is incumbent upon the petitioners who are receivers appointed by the Court of the Subordinate Judge of Devakotta to the estate of the deceased R.M.Ar. Ar.Rm. Arunachalam Chettiar to obtain succession certificates before claiming decrees in the suits filed by them against certain debtors of the estate. It is conceded that these debts are all due under promissory notes executed in favour of the deceased person. In a litigation that arose after the death of the deceased, the

*C.R.Ps. Nos. 868 to 871 of 1941. 3rd July, 1942.

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petitioners were appointed receivers with express authority to sue in their own names as they have done in these suits and realise the outstandings. The Court below has arrived at the conclusion that succession certificates are necessary in view of the provisions of section 214 of the Indian Succession Act. Because such certificates were not produced within the time allowed to the petitioners by the lower Court the suits have all been dismissed.

Since the point involved in these cases affects Government revenue, notice was ordered to the Government Pleader who has appeared along with the respondent's advocate in opposing these petitions.

Mr. Rajah Aiyar, the learned advocate for the petitioners in all these cases relies strongly upon the wording of section 214 (1) (*a*) of the Indian Succession Act. This section states that without a succession certificate

"No Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof."

He contends that after the amendment of this section by the incorporation of the words "on succession" there cannot be any doubt that it is only where a person claims to be entitled to the effects of a deceased person on succession that the provisions of the section can apply. In the present case, he argues that the receivers are officers of Court appointed with special authority to sue in their own names as also in the names of the parties. As already stated these suits were all filed in the names of the receivers and in the circumstances it cannot be said according to the petitioners' learned advocate that the receivers are persons claiming "on succession" to be entitled to the effects of the deceased. Reliance is placed by him also on *Harihar Mukerji* v. *Harendra Nath Mukerji*,[1] which has been followed in *Anil Chandra* v. *Indian Economic Insurance Company*.[2] In the former case the question of the liability of a receiver to obtain a succession certificate before successfully suing the debtors to the estate represented by him was considered and the view taken is entirely in support of the petitioners' case. Mr. Rajah Aiyar also points out that that was a decision pronounced prior to the amendment to section 214 by the addition of the words "on succession" in clause (1) (*a*). The amendment makes the position stronger still.

The learned Government Pleader contends that although the receivers are officers of Court they represent the parties as well and that their suits to recover the debts due to the estate of the deceased must be regarded as having been filed on behalf of the parties. He contends that if the suits were filed by the parties succession certificates would be necessary and that therefore the receivers also must be held to be liable to produce such certificates. I am not satisfied that these contentions urged on behalf of the respondents are well founded. On the basis of the decision in *Harihar Mukerji* v. *Harendra Nath Mukerji*.[1] I hold that in view of the wording of section 214 (1) (*a*) of the Indian

1. (1910) I.L.R. 37 Cal. 754.
2. I.L.R. (1941) 2 Cal. 221.

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Succession Act, it is not necessary that the receivers who have filed the suits in their own names in the exercise of a power expressly conferred upon them by the order of their appointment should produce succession certificates before they can get decrees passed in their favour on proving their respective claims.

The decisions of the Court below are accordingly set aside and the suits that have been dismissed on the ground of non-production of succession certificates are ordered to be restored to file.

In paragraph 21 of the judgment of the lower Court the learned District Munsiff states that if succession certificates are not necessary, then the suits may be decreed since the claims have been proved, the only question that remains outstanding being the necessity to produce succession certificates. It is therefore ordered that S.C. Nos. 264, 512, 516 and 632 of 1939 be decreed with costs. The respondents shall pay the petitioners their costs in these Civil Revision Petitions in this Court.

K.C. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Kalianna Goundan .. *Appellant** (*Plff.*)

v.

Masayappa Goundan .. *Respondent* (*Deft.*).

Kalianna Goundan *v.* Masayappa Goundan.

Hindu Law—Joint family—Survivorship—Attachment of property of undivided member—Death of defendant before decree—Property taken by survivor—Whether free from attachment.

Where there is an attachment before judgment of family property in a suit against a member of an undivided Hindu family who is not sued as the representative of the family, and the defendant dies before the decree is passed, the right of the survivor in the property is not affected and he will get the property free of the attachment. In such a case the attachment is merely intended to protect the property from alienation by the defendant pending the decision of the suit; and until the decree is passed the attachment cannot operate to render the property attached available for sale in execution.

Ramanayya v. *Rangappayya*, (1893) I.L.R. 17 Mad. 144, followed.

Appeal against the decree of the Court of the District Judge of Coimbatore in C.A. No. 645 of 1939, preferred against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 111 of 1938.

N. Sivaramakrishna Aiyar for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *S. Sitarama Aiyar* and *S. Rajaraman* for Respondent.

The Judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—In *Ramanayya* v. *Rangappayya*[1] this Court held that where there is an attachment before judgment of family property in a suit against a member of an undivided Hindu family who is not sued as the representative of the family, and the defendant dies before the decree is passed, the right of the

*S.A. No. 728 of 1940. 5th August, 1942.

1. (1893) I.L.R. 17 Mad. 144.

Kalianna Goundan v. Masayappa Goundan.

Leach, C.J.

survivor in the property is not affected. The basis of this decision is that in such a case the attachment is merely intended to protect the property from alienation by the defendant pending the decision of the suit. Until the decree is passed the attachment cannot operate to render the property attached available for sale in execution. This judgment has been accepted as correctly interpreting the law for nearly fifty years, but the learned advocate for the appellant suggests that the decision is wrong and that the law should be restated.

In the present case two brothers Muthu Goundan and Masayyappa Goundan were joint. On the 21st of October, 1930, Muthu Goundan executed a promissory note in favour of Thanda Goundan the father of the appellant. In 1932, Thanda Goundan filed a suit against Muthu Goundan to enforce payment of the amount due on the promissory note. On the 18th of July, 1932, Thanda Goundan obtained an order of attachment before judgment in respect of Muthu's share in the joint family properties. On the 31st of October, 1932, Muthu died and his widow was made the defendant as the representative of his estate. On the 8th March, 1933, the Court granted the plaintiff the decree which he sought and on his death his son, the appellant, instituted proceedings in execution. In those proceedings it was ordered that the property should be sold on the 4th of November, 1936. On the 12th of October, 1936, Masayyappa Goundan, the respondent in this appeal, filed a petition asking for the discharge of the order of attachment. He claimed that he was joint with his brother and that on his brother's death the whole estate became his by reason of the rule of survivorship. This claim was allowed and the consequence was that on the 21st of March, 1938, the appellant filed the suit out of which this appeal arises to establish his rights to attach Muthu Goundan's share in the family properties. The appellant denied that Muthu and Masayyappa were joint, but this issue was decided against him by the Subordinate Judge and the District Judge concurred on appeal. As it was established that the brothers were joint the case was governed by *Ramanayya* v. *Rangappayya*.[1] Consequently the suit failed. This appeal is from the decree passed by the District Judge in the appeal from the decree of the Subordinate Judge.

In *Krishnarao* v. *Lakshmana Shanbogue*,[2] this Court held that where the interest of an undivided member of a Hindu family in the joint property has been attached in execution of a decree passed against him personally and the judgment-debtor dies pending the attachment a valid charge is created in favour of the plaintiff and this prevents the accrual to the other coparceners of the right of survivorship. This decision was followed in *Lakshmana Aiyar* v. *Srinivasa Aiyar*,[3] *Krishnamachariar* v. *Krishnamachariar*[4] and *Sankaralinga Mudaliar* v. *Official Receiver of Tinnevelly*.[5] It is said that this principle should apply in a case

1. (1893) I.L.R. 17 Mad. 144.
2. (1881) I.L.R. 4 Mad. 302.
3. (1898) 8 M.L.J. 64.
4. (1913) 24 M.L.J. 517: I.L.R. 38 Mad. 166.
5. (1925) 49 M.L.J. 616.

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where there has been an attachment before judgment and the defendant dies before the passing of the decree. There is, however, a very great difference between an attachment before judgment and attachment after judgment. As pointed out in *Ramanayya* v. *Rangappayya*,[1] until a decree has been obtained the attachment cannot operate to render the property available for sale in execution. The Court merely holds the property pending the decision of the suit. Where the attachment has taken place after judgment the decree-holder has what amounts to a charge.

The decision in *Krishnarao* v. *Lakshmana Shanbogue*,[2] which is followed in the other cases to which reference has been made, was based on the judgment of the Privy Council in *Suraj Bansi Koer* v. *Sheo Prasad Singh*.[3] In that case the father's share in the family estate was attached in execution proceedings and the properties were ordered to be sold. He died after the order for sale had been passed. The Judicial Committee held that in these circumstances the creditor had obtained a valid charge upon the land to the extent of the father's undivided share and interest therein which could not be defeated by his death before the actual sale. This decision was reaffirmed by the Privy Council in *Anantapadmanabhaswami* v. *Official Receiver of Secunderabad*.[4]

The learned advocate for the appellant has not been able to refer us to a single case in which the correctness of the decision of *Ramanayya* v. *Rangappayya*[1] has been questioned, excepting *Muthayya Chettiar* v. *Lakshmanan Chettiar*.[5] In that case it was suggested that *Ramanayya* v. *Rangappayya*[1] should be reconsidered, but Krishnan Pandalai, J., did not agree. He rightly pointed out that he would not be justified in attempting to cast doubt upon a doctrine which had then been accepted in this Court for practically forty years. We go further and say that we see no reason to criticise the decision in *Ramanayya* v. *Rangappayya*.[1]

The learned advocate for the appellant has in the couse of his arguments quoted *Sankaralingam Reddi* v. *Kandaswami Thevar*,[6] *Ayyappa* v. *Kasiperumal*[7] and *Parandhamayya* v. *Veerayya*,[8] but these cases have obviously no bearing on the question raised in this appeal, except in so far as *Anantapadmanabhaswami* v. *Official Receiver of Secunderabad*[4] reaffirms the decision in *Suraj Bansi Koer* v. *Sheo Prasad Singh*.[3]

The appeal fails and will be dismissed with costs.

B.V.V. ——— *Appeal dismissed.*

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1. (1893) I.L.R. 17 Mad. 144.
2. (1881) I.L.R. 4 Mad. 302.
3. (1879) L.R. 6 I.A. 88: I.L.R. 5 Cal. 148 (P.C.).
4. (1933) 64 M.L.J. 562: L.R. 60 I.A. 167: I.L.R. 56 Mad. 405 (P.C.).
5. (1931) 34 L.W. 1001.
6. (1907) 17 M.L.J. 334: I.L.R. 30 Mad. 413.
7. (1939) 1 M.L.J. 163: I.L.R. (1939) Mad. 374 (F.B.).
8. (1939) 1 M.L.J. 114.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Pazhaniappa Mudaliar and others .. *Appellants** (*Defts.* 1 *to* 8)

v.

Narayana Aiyar and others .. *Respondents* (*Plffs. and* 9*th Deft.*).

Pazhaniappa Mudaliar *v.* Narayana Aiyar.

Madras Agriculturists' Relief Act (IV of 1938), *section* 8 (1) *and Explanation—Banker and customer—Running account—Capitalising interest at end of each year on overdrafts and adding to principal—If to be treated as advance to customer or interest which can be wiped out in scaling down under section* 8 (1) *of Act IV of* 1938*—If can be treated as renewal or inclusion in a fresh document.*

In respect of dealings commencing from 1903 between a debtor and his creditors (carrying on business as bankers) the extracts from account books, all of which related to the period subsequent to 1924, showed that the account was a running account in three columns, in which were entered the advances made to the debtor, the payments received from him and the balance at credit or debit, as the case may be, resulting from each transaction. Each year interest was calculated at the rate of 12 per cent. per annum on the debtor's overdraft and after deducting counter interest at the same rate on the payments made by the debtor, the amount of the interest was entered on the debit side of the account and a balance was then struck, such balance bearing interest at the same rate during the next year. The latest of such settlements was up to June 30, 1934, showing a balance of Rs. 25,177-2-8 as due from the debtor as for that date. After the account was thus balanced there were no advances but only two payments of Rs. 2,000 and Rs. 1,750 on 15th July, 1934 and 20th June, 1935, respectively, after which the dealings ceased altogether.

In a suit for the recovery of the balance due in respect of such dealings the debtor being an "agriculturist" claimed that all the accrued interest should be deemed to be discharged, and that the payments made from time to time should be applied in reduction of the principal sums by the creditors.

Held: The mode of dealing adopted by the parties is what is usually followed between banker and customer and according to the usage prevailing between bankers and customers, it is an implied term of their dealing that the banker is to be treated as having made an advance to the customer at the end of each year or half year as the case may be of a sum equivalent in amount to the interest accruing during that period so as to enable the customer to discharge the interest, increasing the principal of his debt by a corresponding amount. Accordingly, the interest accruing due each year up to 30th June, 1934, must be deemed to have been paid and discharged and to be no longer "outstanding" to be wiped out under section 8 (1) of the Madras Agriculturists' Relief Act.

Inland Revenue Commissioners v. *Holder*, (1931) 2 K.B. 81, applied.

The Explanation to section 8 of Act IV of 1938 cannot in any view affect the operation of the above principle and it cannot be said that in respect of the capitalised interest the debt has been renewed or included in a fresh document.

In the circumstances of the case, the interest debited in the accounts prior to 1st October, 1932, will be deemed to have been paid and no question of scaling down such interest can arise. The interest found debited subsequently will also be treated as paid but the debits will be liable to be scaled down under section 9 of the Act as advances made after that date. Interest on the rest of the amount from 30th June, 1934, up to 1st October, 1937, will be wiped out. The settlement of account up to 30th June, 1934, will stand except in so far as it is necessary to reduce the interest on the interest

*Appeal No. 187 of 1940. 26th August, 1942.

Pazhaniappa Mudaliar *v.* Narayana Aiyar.

capitalised after 1st October, 1932, from 12 per cent. per annum to 5 per cent.

Appeal against the decree of the Court of the Subordinate Judge of Palghat, dated 23rd January, 1940 and passed in O.S. No. 8 of 1939.

T. R. Venkatarama Sastri and *K. Desikachari* for Appellants.

P. S. Narayanaswami Aiyar for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—This appeal arises out of a suit brought by the respondents 1 to 3 (hereinafter referred to as the respondents) who were carrying on business as bankers, for recovery of the balance due to them on account of dealings had with the appellants. The dealings are said to have commenced in or about 1903 and though there were payments by the appellants from time to time, it would appear that their account was largely overdrawn during most of the period. The main contention of the appellants in the Court below—and their sole contention before us—was that they were "agriculturists" within the meaning of the Madras Agriculturists' Relief Act, 1938, and as such were entitled to the benefits thereof, and that if the debt due to the respondents was scaled down in accordance with the provisions of that Act, practically nothing would be found payable in respect of the debt. It is not disputed that the appellants are agriculturists as that term is defined in the Act, but their contention that all the accrued interest should be deemed to be discharged, and that the payments made from time to time should be applied in reduction of the principal sums advanced by the respondents was rejected by the lower Court which accordingly passed a decree for a sum of Rs. 23,219-2-0 with interest at 6¼ per cent. from 1st October, 1937, till date of plaint, with further interest at 6 per cent. with proportionate costs.

In order to appreciate the contentions raised in the appeal it is necessary to describe briefly the course of dealings followed by the parties. The extracts from the books produced by the respondents, all of which relate to the period subsequent to 1924, show that the account opened in the name of the appellants' firm is a running account in three columns in which were entered the advances made to the firm, the payments received from them and the balance at credit or debit, as the case may be, resulting from each transaction. Each year interest was calculated at the rate of 12 per cent. per annum on the appellant's overdraft and after deducting counter interest at the same rate on the payments made by the appellants, the amount of the interest was entered on the debit side of the account and a balance was then struck, such balance bearing interest at the same rate during the next year. Before the account was thus balanced, a *vaddi chitta* or memo. showing the calculation of interest was sent to the appellants for their verification and their acknowledgment as to its correctness was obtained. That is to say, at the end of each year's operations, the account was settled by the parties and the resulting balance was treated as the principal carrying interest during the next year.

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The latest of these settlements relating to the year ending 30th June, 1934, appears from the entries in the books to have taken place on 15th July of that year when a sum of Rs. 3,141-8-3 was debited as interest due up to the 30th June, and a balance was struck showing a sum of Rs. 25,177-2-8 as due from the appellants as for that date. After the account was thus balanced there were no advances, but only two payments of Rs. 2,000 and Rs. 1,750 on 15th July, 1934 and 20th June, 1935, respectively, after which the dealings ceased altogether, and the respondents have brought the suit, after a preliminary demand for payment, for recovery of the said balance of Rs. 25,177-2-8 with further interest up to date of plaint after giving credit for the two payments aforesaid.

Now, the question arises whether the interest accruing each year and dealt with in the accounts in the manner indicated above comes within the mischief of section 8 (1) of the Act which provides,

> "All interest outstanding on the 1st October, 1937, in favour of any creditor of an agriculturist whether the same be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed repayable by the agriculturist on that date."

It will be seen that the mode of dealing adopted by the parties is what is usually followed between banker and customer; and it is well established that the effect of this system is to capitalize the interest at the end of each year and treat it as a fresh advance by the bank; in other words, according to the usage prevailing between bankers and customers, it is an implied term of their dealing that the banker is to be treated as having made an advance to the customer at the end of each year or half year as the case may be, of a sum equivalent in amount to the interest accruing during that period, so as to enable the customer to discharge the interest, increasing the principal of his debt by a corresponding amount. As pointed out in *Inland Revenue Commissioners* v. *Holder*,[1] this usage which has been adopted by bankers in England for over a century had its origin as a device to secure compound interest by circumventing the usury laws under which agreements for charging compound interest were usurious and illegal; and though the usury laws were subsequently repealed and the necessity for such mode of dealing disappeared, the usage which ascribes to it, as a matter of implied term of contract, the effect referred to above has remained. In the case cited the English Court of Appeal had to deal with a claim to refund of income-tax. The claimants had guaranteed the repayment of monies owing to a bank by one of its customers and were called upon to pay the balances accumulated over a period of years, on the customer's default. Having paid the amount to the bank, they claimed refund of income-tax on so much of the sum paid as was said to be attributable to interest on the advances made by the bank to the principal debtor. The claim could succeed only if the guarantors could be said to have paid to the bank any interest on advances made by the bank, and the question accordingly arose whether the interest which, as between

1. (1931) 2 K.B. 81.

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the bank and its customer, was capitalized at the end of each half year and carried forward into the next half year as principal advanced, could still be treated as accumulated interest paid by the guarantors. The Court held that it could not and rejected the claim. Romer, L.J., after quoting the following observations in *Reddie* v. *Williamson*,[1]

> "Where an account is kept in this way, the interest thus accumulated with principal at the end of each year not only becomes principal but never thereafter ceases to be dealt with as principal" (per Lord Inglis).
>
> "The true view is that the periodical interest at the end of each year is a debt to be then paid and which must be held to have been paid when placed to the debit of the account as an additional advance by the bank (per Lord Cowan)",

and expressing his concurrence with them, concluded thus:

> "I am therefore of opinion that having regard to the method in which, with the concurrence of the company, the account was kept by the bank, the company must be deemed to have paid each half year the accruing interest by means of an advance made for that purpose by the bank to the company."

These observations are equally applicable here, with the result that the interest accruing due each year up to 30th June, 1934, must be deemed to have been paid and discharged, and to be no longer, "outstanding" to be wiped out under section 8 (1) of the Madras Agriculturists' Relief Act.

It was, however, said that the provisions of the Explanation to section 8 had the effect of overriding this result. The Explanation says,

> "Where a debt has been renewed or included in a fresh document in favour of the same creditor, the principal originally advanced by the creditor together with such sums, if any, as have been subsequently advanced as principal shall alone be treated as the principal sum repayable by the agriculturist under this section."

It was urged that the periodical settlement of accounts evidenced by the appellant's letters of acknowledgment were renewals within the meaning of the Explanation, and that only the sums advanced as principal were repayable under this provision, the interest, notwithstanding its capitalisation from time to time, being still treated as interest and wiped out. But if, as pointed out in the case referred to above, the effect of the mode of dealing adopted between banker and customer is, according to the longstanding usage governing their relations, to treat the interest accruing in any year as discharged by a borrowing of an equivalent sum from the bank "in precisely the same way as if the customer had given the bank a cheque upon the account for the amount in question with which the bank extinguished the interest and then placed the amount of the cheque to the debit of the account as an ordinary draft," it is difficult to see how the operation of this principle is affected by anything contained in the Explanation which merely provides that in cases of renewal of the debt, the sums advanced as principal shall alone be treated as the principal sum repayable by the agriculturist; for, the interest of the previous year is, under the rule, discharged, and the corresponding increase in the indebtedness of the customer is treated as a

1. 1 Macph. 228.

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principal sum advanced by the bank. It is also doubtful whether the system under which unpaid interest of any year was turned into capital during the subsequent year by the process of debiting the sum and carrying it forward as part of the interest bearing principal can be said to involve a "renewal" of the debt according to the ordinary connotation of the term. It is, however, unnecessary to pursue this point further, as we are inclined to hold that the explanation to section 8 cannot, in any view, affect the operation of the principle referred to above.

Nor can it be said that the application of the principle in scaling down debts due to banks renders superfluous the exemption of certain liabilities due to "scheduled banks" under section 10 (2) (*iii*) of the Act, as such exemption can still apply in respect of interest due to such banks but not yet capitalised.

In the view we have expressed above, the interest debited in the accounts prior to 1st October, 1932, will be deemed to have been paid and no question of scaling down such interest can arise. The interest found debited subsequently will also be treated as paid but the debits will be liable to be scaled down under section 9 of the Act as advances made after that date. Interest on the rest of the amount from 30th June, 1934, up to 1st October, 1937, will be wiped out. The settlement of account up to 30th June, 1934, will stand except in so far as it is necessary to reduce the interest on the interest capitalised after 1st October, 1932, from 12 per cent. per annum to 5 per cent. The amount due to the respondent will be ascertained on the basis indicated above after giving credit to the two payments received subsequent to the date of the last settlement and the decree of the Court below will be modified accordingly. The parties will pay and receive proportionate costs throughout.

Decree directed to be modified.

K.S.

——

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The Manjeshwar Srimad Anantheshwar Temple by its Executive Officer, K. Padmanabha Kamath .. *Appellant** (*Plaintiff*)

v.

M. Vaikunta Bhakta and others .. *Respondents* (*Defendants*).

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Madras Hindu Religious Endowments Act (II of 1927), section 73—Suit by trustees in office for accounts against ex-trustees of a temple—Previous consent of the Board not necessary.

A suit by the present trustees of a temple against the past trustees for a general account of their trusteeship with allegations of misfeasance, malfeasance and non-feasance is maintainable under the general law. The previous consent of the Board under section 73 of the Madras Hindu Religious Endowments Act is not necessary for such a suit. The general scope of section 73 of the Madras Hindu Religious Endowments Act is the same as section 92 of the Code of Civil Procedure and the last paragraph of section 73 of the Act is meant to refer only to the classes of cases referred

*S.A. No. 407 of 1941. 2nd November, 1942.

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to in section 73 (1) and other sections of the Act. Suits which do not fall within the scope of these sections can be tried under the general law.

Appeal against the decree of the District Court of South Kanara, dated 15th October, 1940, in A.S. No. 189 of 1936, preferred against the decree of the Court of the Subordinate Judge of South Kanara in O.S. No. 112 of 1933.

B. Sitarama Rao and *M. G. Kamath* for Appellant.

K. Rajah Aiyar, M. L. Nayak and *K. P. Sarvothama Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The suit out of which this appeal arises was one under the general law by the trustees in office against ex-trustees for an account of their trusteeship, with allegations of misfeasance, non-feasance, and malfeasance.

The principal question that falls for decision is whether section 73 of the Madras Hindu Religious Endowments Act bars such a suit. The learned Subordinate Judge gave a precis of each of the numerous cases cited before him and then proceeded to draw his general conclusions. They were that the suit could not be brought in its present form and that the remedy of the plaintiffs was to get the accounts audited and to sue for the amount shown to be due. The learned District Judge in appeal did not attempt to discuss the various decisions. He says:

"I have been taken through a long chain of decisions on both sides and the matter is exceedingly intricate and difficult to come to a conclusion upon as slight differences in the facts of each case appear really to have determined the conclusion in the particular case. But the final effect of my consideration of the matter leads me to the conclusion that the correct proposition to follow is that of Mr. Justice Varadachariar in *Sundara Aiyar* v. *Varada Aiyar*,[1] that section 73 contains a general prohibition that no suit in respect of the management or administration shall be maintained except in accordance with the provisions of the Act."

He found that *Singam Aiyangar* v. *Kasturi Ranga Aiyangar*[2] was to the same effect. It is conceded here that neither of these decisions has any bearing on the matter now in issue.

The argument of the respondents is divided into two parts: the first is that the general scope of section 73 of the Act is not the same as section 92 of the Code; while the other is with regard to the meaning of the expression.

"No suit . . . . . shall be instituted except as provided by this Act."

On the first point there can be no doubt; because all the cases quoted below emphasise the fact that the application of section 92 of the Code of Civil Procedure was definitely excluded from the limited class of trusts with which the Hindu Religious Endowments Act was concerned because its provisions were embodied in section 73 and other sections of the Act. That means that section 73, as section 92 of the Code of Civil Procedure, applies to suits by persons interested in the trust against a person who purports to administer the trust. This was emphasised in *Venku Chettiar* v. *Doraiswami Chettiar*[3] by Napier and Odgers, JJ., who

1. (1935) 69 M.L.J. 300: A.I.R. 1935 Mad. 855.
2. (1937) 2 M.L.J. 931.
3. (1921) 14 L.W. 38.

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held that section 92 governs only suits for the vindication of the rights of the public in public charitable trusts and not to suits for vindicting the plaintiff's right of management and getting possession for the purpose of management of the trust properties. Mr. Rajah Aiyar concedes that a suit of the nature that we are now considering would not come within the scope of section 92, which relates to suits against trustees by persons interested in the institution and not by trustees against other persons; and his contention that the scope of section 73 is different from that of section 92, Civil Procedure Code, does not find support in any judicial decisions. In *Chanduk Chand* v. *Vedachala Chettiar*[1] for example, Beasley, C.J., said that there was nothing in section 92 Civil Procedure Code, which had not been taken out of that section and placed either in section 73 or other sections of the Madras Hindu Religious Endowments Act and that if the suit was not within the scope of section 92, Civil Procedure Code, then it would not be governed by the Hindu Religious Endowments Act. In *Venkatacharyulu* v. *Harihara Prasad.*[2] Varadachariar, J., expressed his opinion that section 73 relates to suits against trustees.

The earliest of the cases dealing with the second point is *Vaithilinga Pandara Sannadhi* v. *Temple Committee, Tinnevelly Circle,*[3] which is in respect of a suit to establish the rights of a hereditary trustee. The same argument was advanced there as here, namely, that the suit related to the management and administration of the institution and that section 73 was therefore a bar. The learned Judges pointed out that section 73 of the Madras Hindu Religious Endowments Act was modelled very closely upon section 92, Civil Procedure Code, and that the type of suits contemplated by section 73 of the Act are precisely those contemplated by section 92 of the Code. With reference to the type of case they were considering they held that a suit in respect of the administration or management did not include a claim for personal reliefs. They discussed the meaning of the words on which much argument was based there as here, namely:

> "No suit . . . . shall be instituted except as provided by this Act,"

and said that if one gives these words a strict interpretation, then it might be urged that as even a suit relating to the hereditary trusteeship was connected with the management of the temple, it was barred by section 73 of the Act; but they pointed out that this clause might be interpreted in another way, namely, that:

> "No suit shall be instituted contrary to the provisions of this Act."

The learned Judges thought that meaning preferable to that put forward in appeal that no suit could be instituted unless provided for by the Act; because a literal interpretation would mean that large classes of important disputes could not be decided by any Court at all.

1. (1931) 62 M.L.J. 180: I.L.R. 55 Mad. 549.
2. (1935) 42 L.W. 757.
3. (1931) 61 M.L.J. 815: I.L.R. 54 Mad. 1011.

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The next case in point of time was *Chanduk Chand* v. *Vedachala Chettiar*.[1] That does not have much to say with regard to the second part of section 73 of the Act; but the learned Judges were clear that the purpose of section 73 (2) [which is now section 73 (3)] was the same as section 92 (2) of the Code of Civil Procedure, *i.e.*, it bars suits which would fall within the scope of the first part from being tried otherwise than in accordance with that section. The wording of section 73 of the Act had to be varied from that of section 92 of the Code, because it was intended to affect not only the first part of the section but also the other sections of the Code.

In *Vasudevan Adiserpad* v. *Bhavadasan Nambudri*,[2] Ramesam and Cornish, JJ., were considering a suit against the trustees—which of course fell within the primary purpose of section 73 of the Act—for the removing of the trustees, framing a scheme, taking accounts, etc. Most of the discussion was with regard to the taking of accounts, which is to be found in section 92 of the Code, but is omitted in section 73 of the Act; and they considered that that omission was deliberate and that the legislature did not intend complicated suits of that nature, relating perhaps to large sums of money, to be tried on a court-fee of Rs. 50 under the Hindu Religious Endowments Act. So they held that the suit—which was filed under section 73 of the Act—could not be decreed with regard to that particular relief. They seemed to be of opinion, however, that because the clause of section 92 of the Code relating to taking accounts had been excluded from section 73 of the Act, the plaintiff would have had a remedy under the general law if he had paid sufficient court-fee. That opinion strongly favours the appellant; for the present suit has not been filed under section 73 of the Hindu Religious Endowments Act. Both the learned Judges expressed an emphatic opinion that section 73 (2) of the Act as it then was and section 73 (1) should be read together and that section 73 (2) was therefore intended only as a prohibition against the filing of suits covered by section 73 (1) and other sections of the Code in any manner contrary to the provisions of that section. Any suit not covered by section 73 (1) of the Act or some other section of the Code could be tried under the general law.

In *Vythilinga Pandara Sannadhi* v. *Ranganatha Mudaliar*,[3] Ramesam, O.C.J. and Venkatasubba Rao, J., were considering a suit for the administration and management of a *Kattalai*. Much the same problems were discussed as in *Vasudevan Adiserpad* v. *Bhavadasan Nambudri*.[2] They held that a suit in respect of the administration or management of a *Kattalai* was not covered by section 73 (1) and that therefore a suit with respect to a *Kattalai* could not be decreed under that section but only under the general law. They reaffirmed the principles laid down in *Vasudevan Adiserpad* v. *Bhavadasan Nambudri*.[2]

1. (1931) 62 M.L.J. 180: I.L.R. 55 Mad. 549.
2. (1933) I.L.R. 57 Mad. 315.
3. (1933) 66 M.L.J. 98; I.L.R. 57 Mad. 362.

It will be seen therefore that from *Vaithilinga Pandara Sannadhi* v. *Temple Committee, Tinnevelly Circle,*[1] onwards there was a considerable body of opinion that the general scope of section 73 of the Hindu Religious Endowments Act is the same as section 92 of the Code of Civil Procedure, that the last paragraph of section 73 of the Act is meant to refer only to the classes of cases referred to in section 73 (1) and other sections of the Act, and that suits which do not fall within the scope of these sections can be tried under the general law. I have not come across any case in which these opinions were dissented from or contrary opinions expressed.

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It follows, therefore, that the decisions of the Courts below are wrong and that this second appeal has to be allowed. The suit will therefore be remanded for trial on the merits. The court-fee paid on the appeal in this Court and in the lower appellate Court will be refunded to the appellant. The costs in this Court and the lower appellate Court will abide the result.

K.S. ——— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD THANKERTON, LORD ROMER, SIR CHARLES CLAUSON, SIR GEORGE RANKIN AND SIR MADHAVAN NAIR.

Dr. Sardar Bahadur, Sir Sunder Singh Majithia .. *Appellant**

v.

Commissioner of Income-tax, United and Central Provinces .. *Respondent.*

P.C. — Sir Sunder Singh Majithia *v.* Commissioner of Income-tax, United and Central Provinces.

Income-tax Act (XI of 1922), sections 25-A and 26-A—Hindu joint family—Members of Jat joint family entering into partnership in respect of a business—Question as to genuineness of partnership agreement—Assessability under section 25-A.

Section 25-A of the Indian Income-tax Act contains no warrant for any prohibition that for the purposes of the Act members of an undivided Hindu family cannot enter into a partnership in respect of a portion of the joint property which they have partitioned among themselves. Section 25-A only provides that if it be found that the family property has been partitioned in definite portions, assessment may be made notwithstanding section 14 (1), on each individual or group in respect of his or its share of the profits made by the undivided family, while holding all the members jointly and severally liable for the total tax. If, however though the joint family has come to an end it be found that the property has not been partitioned in definite portions, then the family is to be deemed to continue—that is to be an existent Hindu family upon which assessment can be made on its gains of the previous year. The section has nothing to say of any Hindu undivided family which continues in existence, never having been disrupted. Such a case is outside sub-section (3) because it is not within the section at all.

The family can part with an item of its property to its individual members if it takes the proper steps, for example, by an agreement of partnership with regard to that item. *Biradhmal Lodha* v. *Commissioner of Income-tax,* (1933) I.L.R. 56 All. 504, explained.

If the steps taken by the assessee—a Jat (governed by Hindu law as modified by custom)—to vest in his wife and sons an interest in the immov-

1. (1931) 61 M.L.J. 815: I.L.R. 54 Mad. 1011.

*P.C.A. No. 31 of 1940. 4th June, 1942.

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able assets of a business (by a partnership agreement) were not legally effective—for example, for want of a registered instrument of transfer—it can be held that no genuine firm entitled to registration under section 26-A had come into existence since the wife and sons could not compel the father to perfect a voluntary transfer. But if the assets were joint family property a partition at the hands of the father could be effected even without a written instrument.

I.L.R. (1938) All. 638, reversed.

Appeal from a decision of the High Court of Judicature at Allahabad (Collister and Bajpai, JJ.), dated 9th March, 1938 on a reference submitted by the Income-tax Commissioner, Central and United Provinces.

D. N. Pritt and *F. H. Talbot* for Appellant.

J. Millard Tucker and *W. Wallach* for Respondent.

The Judgment of the Board was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—This is an appeal by the assessees from a judgment of the High Court at Allahabad on a reference made under sub-section (2) of section 66, Income-tax Act, 1922. The question referred arises out of an assessment made for the year 1932-33 on the profits of a business carried on under the style of "The Saraiyar Sugar Factory" at Saraiyar in the district of Gorakhpur in the United Provinces. The year of account is the year ending 30th September, 1931, in accordance with the accounting practice of the assessees. The matter of substance in the present dispute is whether the assessment should be made upon the footing that the business belonged to a Hindu undivided family or upon the footing that it belonged to a firm of which the father, mother and three sons were partners on the terms of a written instrument dated 12th February, 1933. The family are Sher Gill Jats of the Amritsar district of the Punjab. It is not disputed that they form a Hindu undivided family, but with them the general Hindu law is superseded by custom which provides special rules upon many points of family law. The present appeal was brought by Sir Sunder Singh Majithia as father and head of the family, but he has since died and the sons are now the appellants. The written instrument, dated 12th February, 1933, describes itself as an "agreement of partnership" and the parties to it are the father (first party), the mother (second party) and the three sons (third, fourth and fifth parties). The recital and clauses 2, 7 and 8 are as follows:—

"Whereas the first party has set up machinery for manufacture of sugar and extraction of essential oils in his estate in the Gorakhpur district at village Saraiya, tappa Keotali, pargana Hewali Gorakhpur, and sugar and essential oils are manufactured there; And whereas under the personal law of the parties who are Sher Gill Jats of Amritsar district in the Punjab, the father in his lifetime has a right to divide such property as aforesaid, and to give away shares, whether the nature of it is that of self-acquired or ancestral property; And whereas in exercise of the said right the first party has given a share of three annas in the rupee to each of his sons the aforesaid third party, fourth party and fifth party, two of whom-namely, the third and fourth parties have worked hard in making the aforesaid business a success, and he has given a life interest in another share of three annas in the rupee as a special provision to his wife namely,

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the second party, reserving a reversion of the said share to himself if he survives the second party, and if he does not then to the third party, the fourth party and the fifth party (or to their personal heirs in case of their death) in equal shares, and has kept the remaining four annas in the rupee to himself; And whereas the second, third, fourth and fifth parties having been admitted and accepted as partners by the first party all the parties to this deed have already entered into a partnership to work the aforesaid sugar and oil manufacturing machinery and to carry on the business of manufacturing sugar and essential oils, and to do any other business that all of them may agree to carry on for profit.

2. That the shares of the aforesaid parties in the capital, the profit and the loss of the business, are in proportion to the shares mentioned above, namely, the share of the first party who is the senior partner, is four annas in the rupee, and of each of the other parties, namely the second party, the third party, the fourth party and the fifth party is three annas in the rupee.

7. That the liabilities, present (if any) and future of the aforesaid business are and will be the liability of all the partners and will be payable by them in proportion to their shares.

8. In future when further capital will be needed for working, improving or extending the business it will be contributed by all the parties in proportion to their shares."

By other clauses of the agreement it was provided (*inter alia*) that the partnership should not be liable to be dissolved, save with the consent of all the partners, before 1st March, 1945; and that in case of death before that date of any of the partners the father's share should go to the sons in equal shares; the mother's to the father, and the share of a son to his legal heirs. The father and two of the sons were to manage the business, to keep and prepare proper accounts, and to have authority to raise loans (*inter alia*) for making any additions or improvements to the business. They were to draw monthly allowances—Rs. 2,000 in the case of the father, Rs. 1,500 in the case of each of the two sons. In the event of a difference of opinion between the partners the father was to have two votes and a casting vote, each other partner to have one vote. Upon the terms of this agreement it is to be observed that it does not itself purport to effect any partition of family property or to be a transfer of any property movable or immovable by the father to the other parties. It recites that the father has given a share to the other parties. So, too, it does not state that the partnership came into existence on the date of the agreement, 12th February, 1933, but that the parties have already entered into a partnership. It would appear indeed to have been the assessees' case that the oral partition and commencement of the firm took place in September, 1931, and that certain entries were made in the books at that time.

Before 1932, the profits of the factory had been returned and assessed to tax as part of the income of the joint family; but on 13th February, 1933—that is, towards the end of the year of assessment with which this appeal is concerned—the partnership agreement of the previous day was submitted to the Income-tax Officer together with an application that the firm should be registered under S. 26-A of the Act and that the profits of the factory should be separately assessed as income of the registered firm. The Income-tax Officer on 18th April, 1933, allowed this application and made an order of assessment accordingly, but on

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20th September, 1933, the Commissioner of Income-tax set aside his decision and directed that a new assessment be made. On 16th December, 1933, the Income-tax Officer's successor made an assessment on Sir Sunder Singh which included the profits of the factory as his individual income. He refused to register the firm under section 26-A. On appeal to the Assistant Commissioner the refusal to register the firm was upheld, but the profits of the factory were held to be assessable as income of the Hindu joint family. This order was passed on 10th April, 1935. On 21st November, 1935, the Commissioner having been asked to review this decision in exercise of his powers under section 33 of the Act and to refer certain questions of law to the High Court, thought that it was desirable and sufficient to state a case for the opinion of the High Court on what he calls "the main question whether a genuine firm has come into existence." "The whole case for the refusal of the registration from the outset is based on the question whether or not the partnership deed has created a genuine firm such as is entitled to registration under section 26-A and in the event of the assessee succeeding on this point the registration will follow as an inevitable corollary."

He formulated the question of law in the following terms:

"In all the circumstances of the case, having regard to the personal law governing the assessee and the requirements of the Transfer of Property Act (IV of 1882) and the Stamp Act (II of 1899) has the deed of partnership, dated 12th February, 1933, brought into existence a genuine firm entitled to registration under the provisions of S. 26-A of the Act?"

When a document purporting to be an instrument of partnership is tendered under section 26-A on behalf of a firm and application is made for registration of the firm as constituted under such instrument, a question may arise whether the instrument is intended by the parties to have real effect as governing their rights and liabilities *inter se* in relation to the business or whether it has been executed by way of pretence in order to escape liability for tax and without intention that its provisions should in truth have effect as defining the rights of the parties as between themselves. To decide that an instrument is in this sense not genuine is to come to a finding of fact; whether there was evidence upon which it was open to the income-tax authority to come to such a decision is a question of law. Their Lordships do not understand that this is the question of law which the Commissioner by the case stated has intended to refer nor do they gather that he has arrived at any such finding of fact. The Commissioner has given an elaborate account of the returns, contentions and correspondence connected with the assessments made upon the profits of this factory since the year 1918. But the substance of the case stated by him comes in the end to this, that the factory has until recently belonged to the joint family and has been assessed as such; that the members of the family now purport to have carried out an oral "partition" of this particular asset; and have executed the partnership agreement of 12th February, 1933. As to this, the assessees make an alternative case. First, that the factory was the father's self-acquired property and he can alienate it as he likes. Assuming that to be

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correct, the Commissioner says, no question of "partition" arises, but the alienation of immovable property can only be made by a proper deed of transfer as required by the Transfer of Property Act. Secondly, the assessees say in the alternative that the property was joint family property; that no written instrument is necessary for a partition of joint property; and that the transaction in this case was a partition at the hands of the father. To this the Commissioner replies that the shares allotted to the members were not the shares to which they were entitled on partition: hence "the alleged transaction is not a partition in law." In this way, without deciding whether the factory was self-acquired or joint family property and without coming to any findings of fact as to the father's powers under the customary law, the Commissioner concludes that the question propounded by him should be answered in the negative. His reason is that "the sugar factory continues to occupy the same position and status in the eyes of the law as it had before and the steps taken by the assessees to bring about a change are not legally admissible."

The High Court in their judgment of 9th March, 1938,[1] proceed as the Commissioner had done hypothetically—on the hypothesis of self-acquisition and then on the hypothesis of joint family property. The first contention of the assessees was that no immovable property had been alienated or divided by the father, the shares of the wife and sons being shares in the machinery and other movables belonging to the business, but not in the factory buildings or the land on which these stood. It was emphasized that in the partnership agreement of 12th February, 1933, there is no mention of buildings—a contention which has been repeated before the Board. Their Lordships agree with the High Court in rejecting this construction of the agreement. It contains no reference to any stipulation for a tenancy of any kind or for leave and license on any terms. The land and buildings and the right to use them were essential constituents of the factory, and though the agreement does not purport to be itself the transfer of any property or interest from the father to the other members it does purport to express the terms on which the parties after such transfer had agreed to carry on business as a firm. Their Lordships think that it was an essential feature of the partnership agreement as expressed in the instrument of 12th February, 1933, that the wife and sons had a share in the immovables.

On this view the High Court had no difficulty in agreeing with the conclusion arrived at by the Commissioner on the hypothesis that these immovables were self-acquisitions of the father. On the hypothesis that they were joint family property however they were bound to disagree with his view that the alleged transaction could not be a partition because the shares were not in accordance with the parties' legal rights. Indeed this argument was not maintained before the High Court, but an argument based on section 25-A of the Act was put forward instead on the Com-

1. I.L.R. (1938) All. 638.

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missioner's behalf. The High Court accepted this new contention and was thus prepared to answer the question referred to in the negative on the hypothesis of joint family property as well as on that of self-acquisition by the father. The new contention has been maintained before their Lordships and must now be examined. Sub-sections (1) and (2) of section 25-A were introduced into the Act by Act III of 1928 and sub-section (3) by Act XXII of 1930:

"25-A. (1) Where, at the time of making an assessment under section 23 it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and if he is satisfied that a separation of the members of the family has taken place and that the joint family property has been partitioned among the various members or groups of members in definite portions he shall record an order to that effect:

Provided that no such order shall be recorded until notices of the inquiry have been served on all the members of the family.

(2) Where such an order has been passed, the Income-tax Officer shall make an assessment of the total income received by or on behalf of the joint family as such, as if no separation or partition had taken place, and each member or group of members shall in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-section (1) of section 14 be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it;

And the Income-tax Officer shall make assessments accordingly on the various members and groups of members in accordance with the provisions of section 23:

Provided that all the separated members and groups of members shall be liable jointly and severally for the tax assessed on the total income received by or on behalf of the joint family as such.

(3) Where such an order has not been passed in respect of a Hindu family hitherto assessed as undivided, such family shall be deemed, for the purposes of this Act, to continue to be a Hindu undivided family."

On this section the contention of the Commissioner is that for the purposes of the Income-tax Act members of an undivided Hindu family cannot enter into a partnership in respect of a portion of the joint property which they have partitioned among themselves. But in their Lordships' view section 25-A contains no warrant for any such prohibition. It has no reference at all to any case in which the Hindu undivided family remains in existence at the time of assessment. No difficulty whatever in the assessment of a Hindu undivided family is caused—or was ever thought to be caused—by the facts that in one year it has certain assets and certain income therefrom and that in the next year it is found to have parted with one asset and to be no longer in receipt of the same income. The same assessee has a different income in each year—that is all. It matters nothing whether the particular asset no longer possessed by the undivided family has become the separate property of a member or belongs to a stranger. Section 25-A is directed to the difficulty which arose when an undivided family had received income in the year of account but was no longer in existence as such at the time of assessment. The difficulty was the more acute by reason of the provision—an important principle of the Act—contained in section 14 (1): "The

tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

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Section 25-A deals with the difficulty in two ways, which are explained by the rule, applicable to families governed by the Mitakshara, that by a mere claim of partition a division of interest may be effected among coparceners so as to disrupt the family and put an end to all right of succession by survivorship. It is trite law that the filing of a suit for partition may have this effect though it may take years before the shares of the various parties are determined or partition made by metes and bounds. Meanwhile the family property will belong to the members as it does in a Dayabhaga family—in effect as tenants in common. Section 25-A provides that if it be found that the family property has been partitioned in definite portions, assessment may be made, notwithstanding section 14 (1), on each individual or group in respect of his or its share of the profits made by the undivided family, while holding all the members jointly and severally liable for the total tax. If, however, though the joint Hindu family has come to an end it be found that its property has not been partitioned in definite portions, then the family is to be deemed to continue—that is to be an existent Hindu family upon which assessment can be made on its gains of the previous year. With all respect to the learned Judges of the High Court they appear to have mistaken the effect of the previous decision of that Court with which they express agreement: *Biradhmal Lodha* v. *Commissioner of Income-tax*.[1] The section has nothing to say about any Hindu undivided family which continues in existence, never having been disrupted. Such a case is outside sub-section (3) because it is not within the section at all. No sub-section is required to enable an undivided family which has never been broken up to be deemed to continue. But it need not have the same assets or the same income in each year and it can part with an item of its property to its individual members if it takes the proper steps.

The result is that the reasons given by the High Court do not justify a negative answer to the question referred. If the steps taken to vest in the wife and sons an interest in the immovable assets of the business were not legally effective, *e.g.*, for want of a registered instrument of transfer, the negative answer would in their Lordships' view be right, since the wife and sons could not compel the father to perfect a voluntary transfer. But on the assumption that the factory land and buildings were joint family property it has not been shown that a partition at the hands of the father could not be effected without a written instrument. To answer the question of law which has been propounded by the Commissioner it is necessary to descend from the realm of hypotheses to the region of fact. The Commissioner has taken pains to state some matters very fully, but he has not found the material facts as he should have done. It is necessary to know as regards (*a*) the business, machinery, plant and other movables; (*b*) the factory buildings and land whether they were before 1931

1. (1933) I.L.R. 56 All. 504.

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the self-acquired property of the father or his ancestral property or joint family property or whether they fall into some other and what category according to the customary law. It is necessary that the customary law of the family should be found as a fact so as to show what right if any the father had to partition or transfer the movable or immovable property abovementioned, to whatever category it may be found to belong in whole or in part. The riwaj-i-am is evidence of the custom but it is not conclusive and a finding as to custom is required. When the rights of the members of the family have been ascertained, it will be necessary to ascertain whether in fact the father did at any time purport to give shares or interests in any of the above-mentioned property to his wife and sons. If so at what time? What shares did he give? In what manner? In what property? Did he purport to be alienating his own property or effecting a partition of family property or how otherwise? Again, what agreement if any was made prior to 12th February, 1933, and when as to a partnership being constituted to carry on the sugar factory and as to the assets which it was to have as a firm? None of these essential facts have been found and stated by the Commissioner, with the result that the question referred cannot be answered until the High Court has exercised its powers under sub-section (4) of section 66 of the Act. Their Lordships leave it to the discretion of the High Court to specify the particular additions and alterations which the Commissioner should be directed to make.

They will humbly advise His Majesty that the judgment and decree of the High Court be discharged and the case remanded to the High Court for disposal after taking such action under sub-section (4) of section 66, Income-tax Act, 1922, as the High Court may think fit in the light of this judgment. The respondent will pay the appellants' costs of this appeal. The costs already incurred in the High Court will abide the order of the High Court at the final disposal of the reference.

Solicitors for Appellant: *Charles Russell & Co.*

Solicitor for Respondent: *Solicitor, India Office.*

K.S. — *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AYYANGAR AND MR. JUSTICE KUNHI RAMAN.

Syed Ghulam Khadir Sahib and others .. *Appellants** (*Defts.* 2 *to* 7 *and* 10)

v.

Minor Viswanathayyar, by his mother and next friend, Parvathi Ammal and others .. *Respondents* (*3rd Plff. and Defts.* 16 *to* 21).

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Limitation Act (IX of 1908), *Article* 182 (5)—*Execution petition returned for amendment—Failure to re-present—Petition whether saves*

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*A.A.O. No. 90 of 1941. 29th July, 1942.

limitation—Order for return whether final order—Fresh execution petition filed—Duty of Court to consider finality of previous order. Syed Ghulam Khadir Sahib *v.* Viswanathayyar.

When an execution petition is returned for the purpose of the petitioner doing something to enable the Court to proceed further with it, the Court really defers its consideration until it is brought back with the defects remedied. It is only then that the Court is placed in a position to consider it judicially and make what can be regarded as a final order on it.

Kesavaloo v. *Official Receiver, West Tanjore*, (1936) 71 M.L.J. 336: I.L.R. (1937) Mad. 112; *Chidambara Nadar* v. *Rama Nadar*, (1937) 1 M.L.J. 453; I.L.R. (1937) M. 616 (F.B.); *Rama Reddi* v. *Motilal Daga*, (1938) 2 M.L.J. 95: I.L.R. (1938) Mad. 326 and *Chidambaram* v. *Murugesam*, (1939) 2 M.L.J. 671: I.L.R. (1940) Mad. 60, referred to.

An execution petition returned for amendment but not re-presented has no legal existence till it is re-presented, and if it is re-presented after the time limited, it does not acquire the status of a petition calling for an order unless the delay is excused. Where the application for excusing the delay is rejected by the Court the consequence is that there is no valid petition before the Court to be ordered or rejected.

G. R. Naidu v. *Venkatasami Naidu*, (1939) 2 M.L.J. 864; *Official Receiver of Ramnad* v. *Narayanaswami Tevar*, (1941) 2 M.L.J. 1018 and *Sundarabalakadiresa Tevar* v. *Avudaiammal*, (1942) 1 M.L.J. 542, considered.

Decision of Madhavan Nair, J., in (1932) 64 M.L.J. 401 (*Muhammad Abu Bakkar Maracair* v. *Ramakrishna Chettiar*), not followed.

The question whether an order is a final order within Article 182 (5) of the Limitation Act is not to be judged by reference to what the Court passing the order thought at the time, nor by the language employed by it. It is for the Court before which the nature of the order is properly in question at a later stage which has to decide the matter and the decision must be arrived at on an independent consideration of the correct rule of law as applied to the true facts.

Appeal against the order of the Court of the Subordinate Judge of Madura, dated 6th December, 1940 and made in E.P. No. 169 of 1940 in O.S. No. 82 of 1929.

V. Ramaswami Aiyar for Appellants.

A. V. Viswanatha Sastri for Respondents.

The Court delivered the following

JUDGMENTS: *Krishnaswami Ayyangar, J.*—The only question which arises for consideration in this appeal is whether the last execution petition E.P. No. 169 of 1940, filed on 2nd September, 1940 is barred by limitation under Article 182 (5) of the Indian Limitation Act. The learned Subordinate Judge in the Court below has held that it is not. The appellants who are the judgment-debtors contend that the decision of the Subordinate Judge is erroneous. Krishnaswamy Ayyangar, J.

The relevant facts and events are the following:—

6th March, 1930.	Preliminary mortgage decree in favour of the plaintiff.
13th August, 1930.	Final decree.
, 1931.	E.P. No. 24 of 1931 for sale of the hypotheca.
24th August, 1931.	E.P. No. 24 of 1931 closed and removed after some of the items of mortgaged property were sold and Rs. 14,871 was realised.
2nd October, 1933.	Fresh E.P. filed, but never numbered.
5th October, 1933.	The above E.P. was returned with the endorsement, "Sale papers should be filed with encumbrance certificates up to date of the petition. Returned."

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28th September, 1936.	E.P. No. 228 of 1936 filed along with the unnumbered E.P., returned on 5th October, they objected that the E.P. was barred by limitation.
17th June, 1937.	Thereupon E.A. No. 316 of 1937 was filed requesting the Court to treat the application dated 2nd October, 1933, as re-presented with the necessary sale papers. There was also a request for the delay being excused.
29th September, 1937.	Order refusing to excuse the delay and rejecting the unnumbered E.P. with the observation: "But since as observed in *Muhammad Abu Bakkar Maracair* v. *Ramakrishna Chettiar*[1], I have to pass a final order in respect of the unnumbered execution petition, I reject it as not re-presented in time."
30th September, 1937.	E.P. No. 228 of 1936 dismissed on the petitioner's pleader making the following endorsement: "In the light of the order passed on the execution petition presented by the decree-holder on 2nd October, 1933, and returned on 5th October, 1933, and which was re-presented on 29th September, 1936, on which final orders were passed on 29th September, 1937, I propose to renew the execution of this decree by a fresh execution petition. This E.P. No. 228 of 1936 is therefore not pressed."
2nd September, 1940.	The last E.P., *viz.*, No. 169 of 1940 was filed.

The last execution petition filed on 2nd September, 1940, was presented to the Court within three years of the order on E.P. No. 228 of 1936, which was the next preceding petition. E.P. No. 228 had been filed on 28th September, 1936, but was not pressed, and therefore dismissed on 30th September, 1937. The next earlier execution petition was the one presented on 2nd October, 1933. This petition was not taken on file and numbered; but was returned on 5th October, 1933, on the ground that the sale papers were not filed and the decree-holder was required to re-present it within three weeks after remedying the defects. The requisition was not complied with, and indeed nothing was done till 28th September, 1936, though the decree-holder took back the petition from Court on its return. It was on this date, *viz.*, 28th September, 1936, that the fresh E.P. No. 228 of 1936 was filed. The unnumbered petition which had been returned, was also filed along with it, but without any application to excuse the delay. It will be remembered that the three weeks' time granted by the order returning the petition expired on 26th October, 1933. On notice going to the appellants-judgment-debtors in E.P. No. 228 of 1936, they took the objection that it was barred by limitation presumably under Article 182 (5) of the Limitation Act, as more than three years had elapsed from the date of the final order on E.P. No. 24 of 1931 passed so early as 24th August, 1931. The decree-holders then realised the difficulty into which they had got, and

1. (1932) 64 M.L.J. 401.

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attempted to mend matters by filing an application to excuse the delay in the re-presentation of the unnumbered application. This they did by E.A. No. 316 of 1937 filed on 17th June, 1937, in which they put forward an excuse which was found to be totally false. The result was that the delay was not excused. The proper order in the circumstances for the Court to pass was simply to dismiss it. The unnumbered execution petition which should have been treated as never having been duly presented was not properly before the Court and consequently it did not require an order to be made for its disposal. In fact, having no legal existence no order could be made on it. But the learned Subordinate Judge who dealt with this application, E.A. No. 316 of 1937 felt bound by a decision of Madhavan Nair, J., in *Muhammad Abu Bakkar Maracair* v. *Ramakrishna Chettiar*[1] to hold that the unnumbered petition, though returned and not re-presented in time, must still be deemed to have been pending and therefore did require a judicial order to dispose of it. Accordingly he made an order rejecting the petition as not presented in time. This order was passed on 29th September, 1937.

In the Court below it was contended on behalf of the respondents that the order of 29th September, 1937, was a final order passed on an application made in accordance with law for the execution of the decree within the meaning of Article 182 (5). If it was, the last execution petition of 2nd September, 1940, would of course be in time, having been filed within three years of that order. The learned Subordinate Judge accepted this contention and has accordingly held that the unnumbered petition of 2nd October, 1933, was not only one in accordance with law, but also that the order of 29th September, 1937, was a final order which would save limitation.

There can be no doubt that the unnumbered petition was one in conformity with law, the requirements of Order 21, rules 11 to 14, Civil Procedure Code, having been complied (vide *Natesa* v. *Ganapathia*[2]). The mere non-production of the sale papers and the encumbrance certificates cannot be held to be an omission which justified the order of return. For it is not till a later stage that these papers can be called for under rule 194 of the Civil Rules of Practice. I therefore agree with the learned Subordinate Judge in holding that the petition was in accordance with law, and it was wrongly returned. But the more important question to be considered is whether the order of the 19th September, 1937, can be held to be a final order within the meaning of Article 182 (5). The learned Subordinate Judge has held that it is, and in doing so he appears to have paid regard more to the language of the order than to its substance and to the circumstances in which it came to be passed. There is ample authority for the proposition that an order merely returning a petition as defective is not a final order, though in special circumstances such as those which appeared in *Kandasami Chettiar* v. *Gokuldoss*

1. (1932) 64 M.L.J. 401.
2. (1916) 32 M.L.J. 621: I.L.R. 40 Mad. 949.

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Madanji[1], it may amount to one, notwithstanding the language employed. The true test is whether the order puts an end to the application in respect of which it is made, so far as the Court passing it is concerned. (Vide *Chidambaram* v. *Murugesam*[2], *Kesavaloo* v. *Official Receiver, West Tanjore*[3], *Chidambara Nadar* v. *Rama Nadar*[4] and *Rama Reddi* v. *Motilal Daga*[5]. When a petition is returned for the purpose of the petitioner doing something to enable the Court to proceed further with it, the Court really defers its consideration until it is brought back with the defects remedied. It is only then that the Court is placed in a position to consider it judicially and make what can be regarded as a final order on it. But what is the legal position, if the petition is taken back on its being returned, and not re-presented to the Court within the time given? Madhavan Nair, J., sitting as a single Judge had to consider this question in a case where, an execution petition had been returned for certain defects, and was only re-presented with a later execution petition which itself would be out of time but for the order returning the earlier petition. The learned Judge expressed the opinion that no final order had been passed on the earlier petition. No exception can be taken to this view of the effect of a mere order of return. But he went further and held that as no final order had been passed, the petition must be regarded as pending till such an order is made. This view of the law has been adversely criticized and held to be erroneous by Burn and Stodart, JJ., in *Chidambaram* v. *Murugesam*[2], for the obvious reason that if right it would enable a decree-holder to extend the period of limitation at his will by presenting a defective execution petition, and on its return by refraining from re-presenting it. The point is not in controversy as it is now conceded that the decision of Madhavan Nair, J., cannot be supported and I must accordingly hold that the unnumbered petition cannot be regarded as having been pending till it was rejected on 29th September, 1937.

If an execution petition is returned for making good defects pointed out, within a time limited by the order, the course to be followed by the decree-holder has been indicated in *Chidambaram* v. *Murugesam*[2]. The same view is reiterated in *Official Receiver of Ramnad* v. *Narayanaswami Tevar*[6] at page 1022 in the following words:

> "If the petition is returned to the decree-holder for some amendment or compliance with some requisition, it is his duty to re-present it within the time allowed or to get an extension of the time allowed, or to show cause why he should not comply with the requisition, or to pursue the matter in some way until he gets what can properly be described as the final order upon it. If, having received back the petition, he takes no further action upon it, then he should be treated as if he had never put in his petition at all."

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1. (1941) 1 M.L.J. 837.
2. (1939) 2 M.L.J. 671: I.L.R. (1940) Mad. 60.
3. (1936) 71 M.L.J. 336: I.L.R. (1937) Mad. 112.
4. (1937) 1 M.L.J. 453: I.L.R. (1937) Mad. 616 (F.B.).
5. (1938) 2 M.L.J. 95: I.L.R. (1938) Mad. 326.
6. (1941) 2 M.L.J. 1018.

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It follows that an execution petition returned for amendment but not re-presented has no legal existence till it is re-presented, and if it is re-presented after the time limited, it does not acquire the status of a petition calling for an order unless the delay is excused. In the present case, as we have already said, the application for excusing the delay was rejected by the Court on 29th September, 1937, and the consequence was that there was no valid petition before the Court to be ordered or rejected.

Two grounds have been urged before us in support of the contention that the order of 29th September, 1937, should be regarded as a final order. In the first place it is maintained that the fact that the petition was in accordance with law and was wrongly returned, distinguishes the present case from the principle of the decision referred to. I regret I am unable to agree. In *Official Receiver of Ramnad* v. *Narayanaswami Tevar*[1], the petition which was returned was in conformity with the law, but still it made no difference in the decision arrived at. A contrary opinion was expressed by Somayya, J., in *Sundarabalakadiresa Tevar* v. *Avudaiammal*[2]. But surely an order of return, right or wrong, if made by a competent Court is not a mere nullity and cannot be ignored by the party affected. Nor is it open to him to take back the petition and choose his own time for re-presenting it. As ruled in the case cited, he must re-present it within the time limited by the order, and if he does not, he must move the Court for an extension of time, or for excusing the delay. If the Court excuses the delay, the re-presented petition will date back to its original presentation. If the Court however refuses to do so, the position must be the same as if it had never been re-presented, and consequently it never emerged into legal existence. (Vide *G. R. Naidu* v. *Venkatasami Naidu*[3]. The learned Subordinate Judge does not appear to have taken a different view so far as this point is concerned.

The second ground has reference to the language of the order of 29th September, 1937 and the reasons which operated on the mind of the learned Judge in making it. When a lawful petition is properly before the Court, but the Court *rejects* it, the order may be a final order. (Vide *Venkatarama Sastri* v. *Venkatanarasimham*[4].) In the present case the delay in re-presentation not having been excused, there was no need for the Court to deal with the unnumbered petition, which had no legal existence or make an order on it. If a different course was taken, it was because of the decision of Madhavan Nair, J., which has since been declared to be erroneous.

But whatever the view entertained by the Subordinate Judge who made the order and whatever he might have purported to do, it is for the Court dealing with the present E.P. No. 169 of 1940, to consider the legal character of the earlier order. The question whether an order is a final order within Article 182 (5)

1. (1941) 2 M.L.J. 1018.
2. (1942) 1 M.L.J. 542.
3. (1939) 2 M.L.J. 864.
4. (1937) 2 M.L.J. 881.

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is not to be judged by reference to what the Court passing the order thought at the time, nor by the language employed by it. It is for the Court before which the nature of the order is properly in question, which has to decide the matter and the decision must be arrived at on an independent consideration of the correct rule of law, as applied to the true facts. Otherwise the erroneous order of the Judge who passed the order of 29th September, 1937, albeit based on a wrong view of the law, will be perpetuated so as to prejudice the determination of the point by the Court charged with the duty of determining it. It cannot for a moment be contended that the Judge who made that order was competent to pronounce on a matter which is legitimately within the province of the Court whose duty it is to decide on a later occasion whether that order was a final order. That Court is the lower Court on which the duty lay to pronounce on the nature of the order of 19th September, 1937, for the purpose of Article 182 (5). And in doing so, the Court should have come to its own conclusion independently of what the previous Judge said or did when making the order. I am clearly of the opinion that it is not permissible for the Court below to rely on the language of the earlier order, nor on the reasons which prompted the previous Judge to make what in the eye of the law is but a *brutum fulmen*.

The learned Judge in the Court below appears to have been mainly influenced by the circumstance that the order was made in the presence of the appellants and was therefore binding upon them. He has observed that it was open to them to have appealed against it, which they did not do. I cannot see how it can be said that the judgment-debtors are bound to appeal, seeing that the order was in their favour and not against them. A party has no right to appeal against a decree or order wholly in his favour simply because there is some error in the reasoning which led to the making of the order. The learned Judge has correctly appreciated the position when he says that the views taken by the parties are irrelevant when considering the true legal effect of an order. But he however fell into an error in holding himself bound by the terms of the earlier order, simply because the Court which passed it intended to pass a final order in obedience to an exploded decision of this Court. Nor can I agree with him in holding that the language of the order or the reasoning behind it binds the appellants. They are only bound by the order to the extent that it rejected the petition for excusing the delay filed by the respondents and no further. Indeed that was the only order, and it was one that they themselves had invited the Court to pass. I am therefore of opinion that the decision of the Court below cannot be supported. The appeal is accordingly allowed and the E.P. No. 169 of 1940 is dismissed. The respondents should pay the costs of the appellants here and in the Court below.

Kunhi Raman, J.

Kunhi Raman, J.—I agree.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Moorayil Achutha Kurup .. *Appellant** (*Plff.*)

v.

Kandath Veluthedeth Govindan Nayar and others .. *Respondents* (*Defts.*).

Achutha Kurup *v.* Govindan Nayar.

Mortgage—Lease back to mortgagor—Rent fixed in lease contract—Rate of interest in mortgage contract—Suit for recovery of arrears of rent—Effect of lease terms not liable to be affected on grounds not even stipulated in the mortgage—Independent transaction of lease.

The mortgagor under a possessory mortgage got a lease back and the terms of the mortgage were such that the rent due on it was secured by the contract of mortgage. The lease provided for rent at Rs. 24 per annum and interest on arrears at 24 per cent. per annum. In a suit for possession and arrears of rent, it was contended that since the lease must be regarded as part of the contract of mortgage the rent under the lease should be proportionately reduced in accordance with the finding as to the extent to which the mortgage was binding.

Held, that full effect should be given to the terms of the contract of lease and it was not open to the Court to vary the terms of the contract on grounds not even stipulated in the mortgage. Hence the rent was recoverable at the contract rate notwithstanding the finding that the mortgage was binding on the family of the mortgagor only to the extent of one-fourth its nominal amount.

Abdul Khadir v. *Subramania Battar,* (1940) 2 M.L.J. 760, referred to.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, dated 27th March, 1941, and passed in A.S. No. 21 of 1935 (A.S. No. 260 of 1935, District Court) preferred against the decree of the Court of the District Munsif of Calicut in O.S. No. 123 of 1933.

K. N. Kumaran for Appellant.

P. S. Narayanaswami Aiyar for 1st Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff who is the appellant filed a suit for possession and rent on the basis of a lease deed which is contemporaneous with a contract of possessory mortgage in favour of the plaintiff. The lease was to the mortgagor and it is common ground that the terms of the mortgage were such that the rent due on it was secured by the contract of mortgage. The lease provided for rent at Rs. 24 per annum and it was executed on 2nd February, 1896. The claim was for arrears of rent for 19 years and though the contract provides for interest on arrears at 24 per cent., the amount of interest claimed in the plaint works out to a little over 12 per cent. The suit was decreed in full by the trial Court. There was an appeal by the fourth defendant who claims under a subsequent demise from the original lessee-mortgagor and in that appeal no ground was taken regarding the rate of interest for arrears of rent, though the fourth defendant had pleaded in his written statement that the rate of interest was penal but had not pressed the plea to the extent of getting an issue framed on the subject. The lower appellate Court held that

*S.A. No. 1115 of 1941. 21st August, 1942.

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the suit was barred by limitation and S.A. No. 880 of 1937 was filed by the plaintiff. It was heard by Venkataramana Rao, J., who found that the suit was not barred by limitation and that the mortgage in favour of the plaintiff was binding on the family of the mortgagor only to the extent of Rs. 50, though the nominal amount of the mortgage was Rs. 200. The learned Judge remanded the appeal for a decision as to the amount of arrears of rent having regard to a contention that the plaintiff is not entitled to claim the full rent stipulated in the lease in view of the finding that only Rs. 50 was advanced. There was also a contention that the fourth defendant was entitled to relief under section 15 of the Madras Agriculturists' Relief Act, which was referred to the lower appellate Court. In the remand enquiry the lower appellate Court has found that no relief could be given under section 15 of Act IV of 1938 because the tenant had not deposited the rent for faslis 1346 and 1347 within the dates stipulated in section 15. The correctness of that finding is not attacked now.

The lower appellate Court also found that because the lease must be regarded as part of the contract of mortgage the rent under the lease must be proportionately reduced in accordance with the finding as to the extent to which the mortgage was binding. He therefore allowed a rent of only one-fourth the amount stipulated in the contract. At the same time without giving any reason, he reduced the interest on arrears of rent. The learned Subordinate Judge observes,

> "On the basis of the recital in Exhibit A, interest at 24 per cent. has been claimed on such arrears. It is doubtful whether such rate can be decreed now."

As already indicated, although the contract provides for interest at 24 per cent., the plaintiff has limited his claim in such a way that the actual interest claimed in the plaint works out to a little more than interest at 12 per cent.

The reasoning of the learned Subordinate Judge on the basis of which he has reduced the rent payable is that the lease and the mortgage form one transaction, the lease being only in the nature of a machinery for the purpose of realising interest due on the mortgage and that the mortgagor is entitled to a reduction of interest because of the partial failure of consideration and that it does not matter whether this is worked out in a suit for redemption or in a suit on the lease. I am informed that a suit for redemption is now pending and if the mortgagor is entitled to claim as a consequence of failure of consideration that the mortgagee should account to him for a proportionate share of the usufruct—a matter on which I express no opinion—that is a question which can properly be gone into in the mortgage suit and which, in my opinion, does not properly appertain to the suit on the lease. No doubt for some purposes it is necessary to read the lease and the mortgage as parts of a single transaction but as we had occasion to point out in *Abdul Khadir* v. *Subramania Battar*[1], that does not mean that the possessory mortgage and the lease back are to be construed as a simple mortgage pro-

1. (1940) 2 M.L.J. 760.

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viding for interest at a certain rate. The mortgage and the lease back do form part of the same transaction, but effect must be given to each transaction according to its terms and the Court cannot by reading the two together spell out a transaction totally different in its character and incidents. The argument for the contesting respondents is, in the present case, that because this lease is in the nature of a machinery for the collection of the interest, the rent is interest and the amount fixed for rent must be regarded as nothing more than so much per cent. on the principal of the mortgage. Consequently when the principal of the mortgage is shown to be less than the amount expressed in the document of mortgage, there will be a proportionate reduction in the interest and consequently in that which is described as rent. No doubt it has often been said that when there is a possessory mortgage and a contemporaneous lease back to the mortgagor, the lease back is by way of a machinery for the collection of interest on the mortgage. But that does not mean that the rent stipulated in the lease can be varied as if there had been no such stipulation and as if the contract merely provided for the payment of a certain percentage on the principal secured. This contract of lease expressly stipulated for the payment of a certain sum as rent. The amount of that rent is fixed with reference to the usufruct of the property and not as a percentage of the amount of the mortgage. It seems to me to follow that in a suit on the lease full effect must be given to the terms of the contract of lease and it is not open to the Court to vary the terms of this contract on grounds not even stipulated in the contract of mortgage. I am of opinion, therefore, that the plaintiff was entitled to recover rent under the lease-deed at the contract rate notwithstanding the finding that the mortgage is binding on the family of the mortgagors only to the extent of one-fourth its nominal amount.

The decision of the lower Court on the question of interest on arrears of rent cannot be supported. There was no contention in the memorandum of appeal to the lower appellate Court that the interest decreed was penal nor was there any issue in the trial. The learned Subordinate Judge is in error in stating that the plaintiff claimed interest on arrears of rent at 24 per cent., though the contract does provide for interest at this rate. There is no evidence that the interest claimed is more than the customary rate for such contracts in the district concerned and the fact that section 17 of the Malabar Tenancy Act recognised 12 per cent. as the customary rate of interest for *kanom* transactions in South Malabar makes it most unlikely that the rate which the plaintiff has claimed is in excess of the customary rate. It seems to me that there is no legal basis for the reduction of interest which the lower Court has directed.

The appeal is, therefore allowed with costs, the decree of the lower appellate Court set aside and that of the trial Court restored with costs here and in the lower appellate Court. (Leave refused.)

K.C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Jakku Papamma .. *Appellant** (*Plaintiff*)

v.

The Official Receiver, Cuddappah and another. .. *Respondents* (*Deft. & nil.*).

Papamma *v.* Official Receiver, Cuddappah.

Provincial Insolvency Act (V of 1920), sections 4 and 5—Application under for a declaration that property belonged to applicant and for injunction restraining Official Receiver from including it in the estate of insolvent and selling it—Dismissal for default and dismissal of application for restoration of same—If bars subsequent suit for that relief—Civil Procedure Code (V of 1908), Order 9, rule 9—Applicability.

The Official Receiver proceeded to sell the suit property as if it were the property of the insolvent and early in the administration the plaintiff (the insolvent's daughter) filed an application under sections 4 and 5 of the Provincial Insolvency Act asking for a declaration that the property in question belonged to her and for an injunction restraining the Official Receiver from including this land in the estate of the insolvent and selling it. On 29th November, 1937, the District Munsiff, dismissed the application for default of appearance. She then filed an application to restore the petition, which was dismissed on the ground that she had frequently defaulted and that her application was not a *bona fide* one. She then filed a suit against the Official Receiver, again setting up her title to the land. The Official Receiver raised the preliminary objection that the matter had been concluded by the order on her earlier petition and both the District Munsiff and the District Judge in appeal upheld the objection. On second appeal,

Held: As the earlier petition was not disposed of on the merits but dismissed for default of appearance section 4 of the Provincial Insolvency Act was no bar to the plaintiff filing a suit.

Section 5 of the Provincial Insolvency Act applies to applications under that Act the procedure of the Civil Procedure Code. Accordingly the first part of Order 9, rule 9 of the Civil Procedure Code will apply barring a fresh application for the same relief. But section 5 (1) of the Provincial Insolvency Act has regard only to "proceedings under the Act" and hence a separate suit will not be barred.

The equitable principle of election which is only a special application of the general principle of *res judicata* cannot be applied as otherwise there would be no need for section 4 (2) of the Act. Even if it were to apply it may not bar a fresh proceeding when the point in issue had not been considered in the earlier proceeding.

Appeal against the decree of the District Court of Cuddappah, dated 18th November, 1940, in A.S. No. 29 of 1940 preferred against the decree of the Court of the District Munsiff of Cuddappah in O.S. No. 192 of 1938.

C. Padmanabha Aiyangar and *T. K. Srinivasa Thathachariar* for Appellant.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondents.

The Court delivered the following

JUDGMENT:—The appellant is said to be the daughter of the insolvent. The Official Receiver proceeded to sell the suit property as if it were the property of the insolvent; and early in the administration the appellant filed an application under sections 4 and 5 of the Provincial Insolvency Act asking for a declaration that the property in question belonged to her and for an injunction restraining the Official Receiver from including this land in the estate of the insolvent and selling it. She frequently default-

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*S.A. No. 533 of 1941. 2nd November, 1942.

ed in appearance; and at last, on 29th April, 1937, the District Munsiff, adopting the procedure to be followed in a suit, dismissed the application for default of appearance. She then filed an application to restore the petition, which was dismissed on the ground that she had frequently defaulted and that her application was not a *bona fide* one. She now seeks to get rid of those decisions by filing a suit against the Official Receiver, again setting up her title to the land. The Official Receiver raised the preliminary objection that the matter had been concluded by the order on her earlier petition; and both the District Munsiff and the District Judge in appeal upheld the Official Receiver's objection. She has come here in second appeal.

Under section 4 of the Provincial Insolvency Act the Court is not bound to go into claims raised by third parties; but there can be no doubt that the Court did in this case deem it expedient and necessary to decide the question that the appellant raised; and if that question had been decided on the merits, there can be no doubt at all that she would not have been entitled to raise the question again in any other litigation. The question however is whether, in view of the fact that the petition was not disposed of on the merits but was dismissed for default, section 4 applies. Sub-section (2) of that section runs,

> "Subject to the provisions of this Act . . . *every such decision* shall be final and binding for all purposes as between, on the one hand, the debtor and the debtor's estate, and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them."

The question is, was there any decision? I find it difficult to answer that question in the affirmative. Section 5 applies the procedure of the Civil Procedure Code to applications under the Insolvency Act; and so the Insolvency Court, upon the failure of the plaintiff to appear, was bound to dismiss her application. It had no choice in the matter; it made no decision.

If section 4 does not prevent the appellant from filing a suit, it remains for consideration whether section 5 read with the Civil Procedure Code prevents her from doing so. Section 5 (2) does not say that the Code shall be applied to all proceedings; but it says,

> "High Courts and District Courts, in regard to proceedings under this Act in Courts subordinate to them, shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits."

It follows from that, I consider, that the Court had the power under Order 9, rule 8, Civil Procedure Code, to dismiss the application for default. It is contended that the first part of rule 9 of Order 9, which says,

> "Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action,"

is not a power given to the Court nor is it a procedure. Nevertheless, I think that the first part of Order 9, rule 9 must be applied; otherwise it would make the other parts of Order 9 without meaning. There is no point at all in dismissing the application of a defaulting petitioner if he could immediately

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come in and file a fresh application asking for precisely the same relief.

Assuming then that Order 9, rule 9 applies, does it preclude the appellant from filing a suit? Mr. Padmanabha Aiyangar says that it does not, and for two reasons. The first is that Order 9, rule 9 only prohibits a fresh suit on the same cause of action; and he says that the suit filed by the plaintiff is not on the same cause of action as the application in the Insolvency Court. Although the cause of action indicated in the present suit is not that in the insolvency proceeding, I do not consider that they are independent causes of action. The reason why the appellant came to the Insolvency Court and asked for relief was that the Official Receiver was claiming that the property belonged to the insolvent and he was putting into action the procedure to be followed in the administration of an insolvent's estate. He began by including it in the schedule. He would then proceed to proclaim the property and sell it and so on; but it was all part of the same procedure. The cause of action referred to in the suit is the proclamation for sale; but that was merely a later stage of the same procedure to which he objected earlier.

The real difficulty in this appeal is with regard to the scope of the application of Order 9, rule 9 to proceedings other than insolvency proceedings. Section 5 (1) of the Provincial Insolvency Act says,

> "Subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction."

So section 5 (1) has regard only to proceedings under the Act. If we substitute for the word "suit" in Order 9, rule 9 the word "proceedings" in both places where the word "suit" occurs, then clearly Order 9, rule 9 would not prevent the filing of a suit. A suit could only be barred by substituting "proceedings" for "suit" in the first instance and not in the second. So in attempting to apply section 5 to bar a suit one is faced with the double difficulty that one can only do so by omitting to substitute the word "proceedings" for the word "suit" in Order 9, rule 9 in the second instance and that the wording of section 5 (1) seems to limit the application of the section to proceedings under the Act.

Reference has been made to an equitable principle of election. A person has the choice of two forums. If he prefers one forum he cannot, because he finds its decision distasteful, then have recourse to the alternative forum. No authorities have been quoted as to how far this equitable principle, which seems to be a special application of the general principle of *res judicata*, can be applied; but if its application were as wide as the learned advocate for the respondent suggests, there would be no need for section 4 (2) of the Act. Moreover, it is not at all obvious that even on the widest application of this equitable principle, it would bar a fresh proceeding when the point in issue had not been considered in the earlier proceeding.

The appeal is allowed and the suit remanded to the trial Court for disposal on the merits. Costs so far incurred in all the three Courts will abide the result.

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The case having been set down for being mentioned this day, the Court made the following

Order.—Refund certificate do issue.

K.S. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AYYAR.

S. T. P. Marimuthu Pillai .. *Appellant** (*Plff.*)

v.

The Province of Madras represented by the Collector of Trichinopoly .. *Respondent* (*Deft.*).

Marimuthu Pillai v. Province of Madras.

Madras Irrigation Cess Act (*VII of* 1865), *section* 1 (b)—*Irrigation with water from tank fed by Government channel—Right of Government to levy cess.*

Certain lands of the appellant were irrigated from a tank or *kuttai* formed in patta land belonging to the appellant. But the Government claimed, that water flowing through a channel belonging to the Government being the main source of supply of water to the tank, the Government was entitled to levy irrigation cess under section 1 (*b*) of the Madras Irrigation Cess Act.

Held, that the Government was entitled to levy the cess.

Veera Raju v. *Secretary of State for India in Council,* (1940) 1 M.L.J. 152, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly, in A.S. No. 19 of 1938, preferred against the decree of the Court of the District Munsiff of Turaiyur in O.S. No. 28 of 1936.

T. V. Muthukrishna Aiyar for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. His suit for an injunction restraining the defendant from collecting irrigation cess in respect of his lands survey fields Nos. 21 and 16 in Vadakkuvali village and for recovery of the cesses collected for faslis 1343 and 1344, was dismissed by both the Courts. These lands are irrigated with water taken from a tank or *kuttai* formed in the patta land of the appellant himself, Survey Field No. 22. But the Government case is that water flowing through a *vari* or channel belonging to the Government is the main source of water supply for this *kuttai* and that therefore the Government is entitled to levy irrigation cess under section 1 (*b*) of the Madras Irrigation Cess Act.

The lower appellate Court has found that it is a *vari* which enters the tank from the north that is the main source of supply of water and that it starts from the Government village of Gollapatti, which is north of Chokkanadapuram and therefore it is water flowing through a channel belonging to the Government that is stored in the tank and used for irrigation purposes and

*S.A. No. 456 of 1941. 1st October, 1942.

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therefore the appellant is liable to pay the irrigation cess levied. It is a pure finding of fact that the tank or the reservoir from which the water is used by the appellant for irrigating his lands gets its water from a *vari* which belongs to the Government and it is not open to this Court to go behind it.

If that be so, under section 1 (*b*) of the Madras Irrigation Cess Act, Government is entitled to levy the cess. The case reported in *Veera Raju* v. *Secretary of State for India in Council*[1] has no application to the facts of this case. That was a case in which this Court had to deal with the proviso to that section. There an owner of a ryotwari land who was entitled to irrigate his land from a Government source and who stored up the water and used it for the cultivation of his lands, was held not liable to pay the irrigation cess levied by the Government, and that he was saved by the proviso to the section. The facts of that case are entirely different and that decision cannot be said to govern the imposition of cess in a case like the one in question in this suit. It is not the appellant's case that he is entitled to take the water flowing through that *vari* and irrigate his lands and therefore the storing of the water in his tank would not justify the imposition of the irrigation cess. It has not been his case nor has it been found that the water flowing through the channel which empties itself into the tank is a recognised source of irrigation for his land. Hence the decision in that case has no application to the facts of this case.

In the result the second appeal fails and is dismissed with costs.

(Leave refused).

K.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Commissioner of Income-tax, Madras .. *Appellant** (*Referring Officer*)

v.

The Bar Council, Madras .. *Respondent* (*Applicant*).

Commissioner of Income-tax, Madras v. Bar Council, Madras.

Indian Income-tax Act (XI of 1922), *section* 4 (3)—*Bar Council income—Whether taxable—Investments—Income therefrom devoted to educational purposes—Income from fees for enrolment and examination assessable.*

On the question whether the income of the Madras Bar Council was taxable under the Income-tax Act as such,

Held, (1) that the income derived from investments of the Bar Council, if those investments were held by the Council for educational purposes, would be exempt from assessment under section 4 (3) (*i*) of the Income-tax Act;

(2) that the income derived from enrolment of members of the profession and examination fees of apprentices-at-law is taxable.

Accordingly, the Bar Council was directed to maintain two separate accounts, one for investments by it and the other for the receipts of moneys from enrolment fees and examination fees.

1. (1940) 1 M.L.J. 152.

*R.C. No. 11 of 1942. 9th November, 1942.

Commissioner of Income-tax, Madras *v.* Bar Council, Madras.

Case referred to the High Court by the Income-tax Appellate Tribunal, Calcutta Bench, under section 66 (1) of the Indian Income-tax Act, 1922 (XI of 1922) as amended by section 92 of the Indian Income-tax (Amendment) Act, 1939 (VII of 1939) in Application No. 66, R.A. Nos. 5 and 6, Madras of 1941-42 on its file for decision on the following questions of law:

(1) Whether the income of the Bar Council from the various sources set out in the Assessment Order is exempt under section 4 (3) (*i*) of the Income-tax Act?

(2) Whether the status of the Bar Council for the purposes of assessment is that of an "individual" or whether it does not come under any of the classes of persons liable to pay income-tax under the Indian Income-tax Act? and

(3) Whether the whole or any part of the receipts of the Bar Council are income, profits or gains assessable to income-tax?

K. V. Sesha Aiyangar for Appellant.

The Advocate-General and *M. Subbaraya Aiyar* for Respondent.

(This reference coming on for hearing on the 2nd November, 1942, the Court delivered the following)

Leach, C.J.

JUDGMENT. *The Chief Justice.*—The questions referred by the Income-tax Appellate Tribunal relate to the liability of the Bar Council of Madras to income-tax. The Income-tax Authorities have imposed a tax on the income of the Council for the years 1939-40 and 1940-41. In the previous years no tax was levied, it being taken that the income of the Council was not taxable under the Act. It may be mentioned that the Bar Councils of Calcutta, Bombay, Allahabad, Lucknow, Patna, Sind and Nagpur have not been required to pay tax on their income. The income of the Council consists of fees paid by persons enrolled as advocates of the High Court, examination fees paid by the apprentices-at-law and interest of investments. The enrolment fees provide the biggest source of income. The income is utilised for meeting the establishment expenses and the payment of fees to lecturers and examiners. The Council is a statutory body whose main functions relate to the enrolment of persons as advocates of the High Court, the rights and duties of advocates and their discipline and professional conduct. Its duties, however, include the giving of facilities for legal education and training and the holding and conduct of examinations.

Section 3 of the Income-tax Act which is the charging section makes, *inter alia,* an individual or association of persons liable to pay the tax on income. The Council has been taxed as an individual, and there can be no doubt that it is an individual or association of persons within the meaning of the section. Therefore its income is taxable unless exemption is to be obtained under the provisions of section 4 (3). Clause (1) of sub-section (3) exempts income derived from property held under trust or other legal obligation wholly for religious or charitable purposes and, in the case of property so held in part only for such purposes, the income applied or finally set apart for application thereto. The

Commissioner of Income-tax, Madras v. Bar Council, Madras.

Leach, C.J.

last clause of this sub-section defines what is meant by the words "charitable purpose" and the definition includes education.

When the Income-tax Officer proposed to assess the Council to income-tax, it claimed total exemption by reason of clause (1) of the sub-section and the case has proceeded throughout on that basis. The Council appealed from the Income-tax Officer's order to the Appellate Assistant Commissioner and from the latter's order, which confirmed the Income-tax Officer's order, to the Income-tax Appellate Tribunal, which agreed with the income-tax authorities that this clause did not exempt the income of the Council.

Now, it is clear that it does exempt income derived from the investments of the Council if those investments are held by the Council for educational purposes. This aspect of the case has not been considered. The learned Advocate-General who appears on behalf of the Council has stated to the Court that the investments of the Council have been made, and the fund represented by them is held, for educational purposes. This being so, this income is not taxable. On the other hand it is quite clear that the income derived from enrolment and examination fees is taxable income. At the suggestion of the Court, the Council will make a formal statement to the Income-tax authorities with regard to the purposes for which the investments are held. In these circumstances Mr. Sesha Aiyangar, on behalf of the Income-tax authorities, suggests that the case may be allowed to stand over for a week in order to enable him to obtain instructions from the Commissioner of Income-tax. We agree to this course and the case will stand out of the list until next Monday. If it is possible, as it appears likely, that an agreement may be arrived at, it will not be necessary for this Court to answer the reference.

(This reference again coming on for hearing, the Court made the following)

ORDER.

The Chief Justice.—The learned Advocate-General on behalf of the Bar Council states that the Council will utilise its income from investments solely for legal education and for expenses, including establishment charges, in connection therewith. In future separate accounts will be maintained for this purpose. In past years the Council have been treating the investments and income therefrom as applicable to legal education, though no separate accounts have been maintained in respect of the investments. This makes it perfectly clear that the income of the Council received from investments is not taxable. As we have pointed out in our Order, dated the 2nd November, 1942, the income from enrolment and examination fees is taxable. The Commissioner of Income-tax accepts the statement of the learned Advocate-General.

In these circumstances the assessment for the years in question should be made on this basis. The questions referred will be answered in the sense indicated in our two orders.

There will be no order as to costs.

K.C. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL.

Pachayakkal and another .. *Petitioners** (*Defts.* 2 *&* 3)

v.

Shanmughavelayudhasami Gopanna Mannadiar and others ... *Respondents* (*Plff.-Defts.* 1 *&* 4 *to* 7).

Pachayakkal v. Shanmughavelayudhasami Gopanna Mannadiar.

Court-fees—Appeal against decree in redemption suit—Proper court-fee—Court-Fees Act, section 7, clause (ix) *and Article* 1 *of Schedule I.*

If in an appeal against a decree in a suit brought for redemption the appeal relates only to the amount payable and not to the right of redemption, court-fee must be paid *ad valorem* on the amount claimed to be payable. Even where the appeal purports to dispute both the right of redemption and the amount payable if in substance it relates only to the amount payable there again court-fee must be paid *ad valorem* on the amount claimed. But if the right of redemption and the amount payable are both disputed in appeal and both grounds are grounds in substance and not merely in form the court-fee payable will be as for a suit under section 7, clause (*ix*) of the Court-Fees Act.

It cannot be said that it is the form alone and not the substance of the appeal which determines the question of court-fees.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of Coimbatore, dated 12th August, 1941 and made in Court-Fee Register No. 2069 of 1941 (O.S. No. 1117 of 1938, District Munsiff's Court, Coimbatore), etc.

M. Krishna Bharathi and *S. Ramachandra Aiyar* for Petitioners.

The Government Pleader (*K. Kuttikrishna Menon*) and *S. S. Ramachandra Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners in this group of civil revision petitions, which all relate to the same question of court-fee, were the legal representatives of the first defendant in three suits for redemption brought by the respondents in the Court of the District Munsiff of Coimbatore. The contentions of the respondents as plaintiffs in these suits were substantially that Act IV of 1938 applied and that they were entitled to possession without paying anything more. The contentions were accepted and a decree was passed directing the defendants to deliver possession of the properties to the respondents. Against this decree the petitioners filed appeals in the Court of the District Judge of Coimbatore. In their memoranda of grounds of appeal the contention was raised in one form or another that the respondents were not entitled to redemption; but it was also pleaded that Act IV of 1938 did not apply, that the principal amount had not been fully discharged, and that in any case there were improvements, the value of which had to be paid to the appellants before delivery of possession could be given. The learned District Judge was of

*C.R.P. Nos. 2747, 2748, 2769 of 1941, and 48, 334 and 335 of 1942.
15th October, 1942.

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opinion that in spite of the form of the memorandum of appeal, the only substantial ground of appeal was the allegation that there were improvements the value of which had to be paid before possession could be delivered. The petitioners have paid court-fee in respect of the appeals according to the principal money secured by the instrument of mortgage.

Under the provisions of section 7, clause (*ix*) of the Court-Fees Act, court-fee is payable according to the principal money secured by the instrument of mortgage in suits against a mortgagee for the recovery of the property mortgaged. Section 7, clause (*ix*) refers to suits, but it is established by a long line of decisions that in appeals also whether by the plaintiff or by the defendant, from decrees in suits for redemption provided that both the right to redeem and the amount payable are disputed, court-fee has to be paid only on the principal amount secured by the instrument of mortgage. There is no doubt, however, that where the only ground in an appeal from a decree in a suit for redemption is with regard to the amount payable, court-fee must be paid *ad valorem* on that amount under Article 1 of Schedule I of the Act. In effect, therefore, the court-fee payable in these appeals depends on whether it is the substance or the form of the appeal which has to be considered in assessing the court-fee payable. The petitioners, in form at least there can be no doubt, do dispute in their memoranda of grounds of appeal both the right to redeem and the amount payable; but, as already stated, the learned District Judge was of opinion that the only substantial ground of appeal was the ground that the appellants were entitled to the value of improvements. In this view there can be no doubt that the learned District Judge was right. There is an omnibus paragraph towards the end of the grounds of appeal to the effect that the lower Court was wrong in failing to note that the suit is barred by estoppel, waiver and laches of plaintiffs-respondents; but it is plain from what has transpired in this Court that there is no arguable point taken in the grounds of appeal except that Act IV of 1938 did not apply and that there were improvements which had to be paid for. It is argued, indeed that the contention with regard to Act IV of 1938 is a contention which in effect amounts to a denial of the right to redemption. There is, however, no substance in this argument since the only result of a finding that Act IV of 1938 did not apply would be that something would have to be paid by the respondents before delivery to them could be effected; their right to redemption would remain. Again, it is argued that the petitioners did in effect contest the right to redemption because if their contentions were accepted, the suits would have to be dismissed. This is not correct. The respondents as plaintiffs claimed that by virtue of Act IV of 1938 nothing more remained to be paid but they asked that if this submission was not accepted, the amount to be paid should be fixed by the Court. Even, therefore, if the appeals were to be allowed, the result would not be the dismissal of the suits. The result would be that an account would be taken, a preliminary decree passed and time given to the respondents to pay the amount found to be due.

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What then is the position if in spite of certain recitals in the memorandum of appeal the substantial ground of appeal is with regard to the amount paid? It was pressed on the learned District Judge that the question was concluded by the decision in *Pathumma Umma* v. *Aliyamakkanakath Mohideen*[1]. In that case the substantial question in an appeal against a decree in a suit for possession was with regard to the payment of value of improvements but the question of title was raised. It was held that court-fee had only to be paid as on a suit for recovery of possession. In the course of his judgment, Srinivasa Aiyangar, J., observed that, though there was considerable force in the contention of the respondents that the subject-matter in dispute had reference only to the amount of compensation and that the question of title raised was a mere "camouflage" for escaping liability for court-fees, he was not prepared to say that it was not open to the parties to avail themselves of any "camouflage" that the law allows or does not forbid; and he expressed the opinion that it was not open to the Court to neglect the actual form of the appeal and determine the question of court-fees having regard to what might be said to be the substance of the claim. The learned District Judge, after referring to *Pathumma Umma* v. *Aliyamakkanakath Mohideen*[1] and to the decision in *Reference under Court-Fees Act, section 5*[2], referred to in it, observed that,

> "in the face of these authorities it was difficult not to accept the appellants' contention."

He did not however accept the contention because in his view a recent decision of a Full Bench of this Court in *Ramaswami Aiyangar* v. *Rangachariar*[3] stood in his way. He says in effect that Srinivasa Aiyangar, J., had stated that it was the form and not the substance of the appeal that must be looked at in order to determine the question of court-fee whereas in *Ramaswami Aiyangar* v. *Rangachariar*[3], the Full Bench held that it was the substance and not the form that determined the court-fee to be paid. As the learned Chief Justice observed in that case;

> "the plaintiff must pay court-fee in accordance with the relief which he is actually seeking. He cannot be allowed to evade payment by omitting to ask for relief when the success of his suit depends on relief being granted to him. The Court must look at the real nature of the suit and decide what the plaintiff is asking for."

In my opinion the decision of the learned District Judge is right and, since the substance of the appeal is the amount to be paid before redemption can be claimed, I can have no doubt that the fee payable is an *ad valorem* fee under Article 1 of Schedule I and not a fee based on the principal amount secured by the original mortgage.

It should, I think, be pointed out that the observation of Srinivasa Aiyangar, J., in *Pathumma Umma* v. *Aliyamakkanakath Mohideen*[1] that it is the form of the appeal which determines the question of court-fee and not the substance seems to have been to some extent *obiter*. It is not clear that it was

1. A.I.R. 1928 Mad. 929.
2. (1899) I.L.R. 23 Mad. 84.
3. (1940) 1 M.L.J. 32: I.L.R. (1940) Mad. 259 (F.B.).

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necessary for the decision of the case since it was not specifically found by Srinivasa Aiyangar, J., that the question of title raised in the appeal was without substance. Reilly, J., who delivered a separate but concurring judgment, does not consider whether the question of title was without substance and raised merely for the purpose of escaping court-fee. He bases his decision on the authority of the earlier case reported in *Reference under Court-Fees Act, section 5*[1], and pointed out that whereas the *obiter dictum* in that case that,

> "'even where the only question raised is as to the value of the improvements the appellant should not be called upon to pay any fee other than that payable in suits for possession of land'

has not been adopted in later cases."

the actual decision, namely, that

> "'a defendant disputing on appeal both the plaintiff's title to recover and the amount of compensation to be awarded need pay court-fee only as on a suit for recovery of possession'

has never been overruled."

Reilly, J., himself was a party to a case reported in *Kattiya Pillai* v. *Ramaswamia Pillai*[2], in which it was held that in deciding the proper court-fee payable it was to the substance of the thing and not the mere form in which the relief had been prayed for that regard must be had. Other decisions to the same effect which might be cited are *The Secretary of State for India in Council* v. *Lakhanna*[3] and *Kayathan Roche* v. *Chinnayya Roche*[4]. I do not therefore think that in holding that *Pathumma Umma* v. *Aliyamakkanakath Mohideen*[5] could not be followed in view of the Full Bench decision the learned District Judge as he seems to have thought was departing from a long line of decisions. What the learned Judge was differing from was not the view that where both the right to redeem and the amount payable were disputed the court-fee payable in appeal was as on a suit under section 7 (*ix*) of the Court-Fees Act, but the view that in assessing court-fee it was the form and not the substance of the appeal that had to be considered. And in support of the latter proposition there would seem to have been even before the decision in *Ramaswami Aiyangar* v. *Rangachariar*[6] no uniform body of authority. The position seems clear (1) that if in an appeal against a decree in a suit brought for redemption the appeal relates only to the amount payable and not to the right of redemption, court-fee must be paid *ad valorem* on the amount claimed to be payable; (2) if the appeal purports to dispute both the right of redemption and the amount payable but in substance relates only to the amount payable, again court-fee must be paid *ad valorem* on the amount claimed; but (3) if the right of redemption and the amount payable are disputed in appeal and both grounds are grounds in substance and not merely in form the court-fee payable will be as for a suit under section 7, clause (*ix*) of the

1. (1899) I.L.R. 23 Mad. 84.
2. (1929) 56 M.L.J. 394.
3. (1932) 64 M.L.J. 24.
4. (1939) 1 M.L.J. 425.
5. A.I.R. 1928 Mad. 929.
6. (1940) 1 M.L.J. 32: I.L.R. (1940) Mad. 259 (F.B.).

Court-Fees Act. It follows from the above that the petitioners have to pay court-fee in respect of their appeals in proportion to the amounts they have claimed to be payable to them. One month's time from to-day is granted for payment of court-fee.

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The petitions therefore are dismissed with costs, one set in each batch.

K.S.   *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

S. Pattammal .. *Petitioner** (*Applicant*)

v.

The Corporation of Madras and others .. *Respondents* (*Plff. and Defts.*).

Pattammal v. Corporation of Madras.

City Municipalities Act (IV of 1918), section 103—Corporation selling a house for realising arrears of tax—Balance after arrears of tax were met—Claimant mortgagee auction-purchaser—Reliance on section 73 of Transfer of Property Act (IV of 1882) not helpful.

Where a house was sold by the Corporation of Madras for arrears of property-tax in the enforcement of a first charge given to the Corporation by section 103 of the City Municipalities Act and after the arrears of tax had been met there was a balance remaining which was claimed by the auction-purchaser as due to her on the allegation that she was already a mortgagee of the property,

Held, that the petitioner could not rely upon section 73 of the Transfer of Property Act because that section can apply only to sales in which property is sold free of all mortgages. Hence her petition would have to be dismissed.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the City Civil Court, Madras, dated 22nd day of November, 1940, and made in C.M.P. No. 3038 of 1940 in O.S. No. 982 of 1935.

C. R. Rajagopalachari for Petitioner.

A. Suryanarayaniah and *O. K. Nambiar* for Respondents.

The Court delivered the following

JUDGMENT.—The petition arises from the sale of a house by the Corporation of Madras for arrears of property tax due upon it, in the enforcement of the first charge given to the Corporation by section 103 of the Madras City Municipalities Act. After the arrears of tax had been met, there remained a surplus of Rs. 1,250. The petitioner before me is the auction-purchaser who made a claim in the City Civil Court for the refund of this money to her on the allegation that the house had been mortgaged to her. The original defaulter is dead; two of his legal representatives supported the petitioner's claim, one of them (3rd defendant in the suit) contested it on the ground that the alleged mortgages in the petitioner's favour were nominal. The learned Additional City Civil Judge dismissed the claim on the ground that by the purchase petitioner's mortgages had ceased to exist, and therefore she had no *locus standi* to ask for the money. Other matters in issue were left undecided.

*C.R.P. No. 1070 of 1941.   28th September, 1942.

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In the present petition, the petitioner who seems to have relied in the lower Court upon section 101 of the Transfer of Property Act in an attempt to convince the Court that her mortgages had not merged, maintains that she has an undoubted right to this money under section 73 of the same Act. It is perhaps not altogether an easy question to answer whether if section 73 applies to this sale, petitioner would be precluded from taking advantage of it by the fact that she combines in her own person the capacities of both purchaser and mortgagee. But in my opinion section 73 from its very language, can apply only to sales in which property is sold free of all mortgages. Section 103 does not give the Corporation the right to sell property free of encumbrances as is given for example by section 42 of the Revenue Recovery Act. In the present case, the Corporation has filed an ordinary suit, to which petitioner was not a party, and has proceeded to sell the property on a proclamation which makes no mention of any mortgage at all. The sale cannot therefore affect the rights of any mortgagee or transform them into the lesser rights granted by section 73. If the petitioner thought as she probably did, that the sale was being held free of her mortgages, she has unfortunately misconceived the true position. I am of opinion accordingly that petitioner cannot rely upon section 73 and that this petition must be dismissed with costs of the contesting respondent.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

L. N. Abdul Sathar Sahib .. *Petitioner** (*Accused*).

Abdul Sathar Sahib, *In re.*

Madras General Sales Tax Act (*IX of* 1939), *section* 15—*Magistrate's sentence of fine in anticipation of a default—Not proper.*

There is no power in a Magistrate who tries an offence under section 15 of the Madras General Sales Tax Act to impose a fine in anticipation of the offence being continued.

Haluman Sah v. *Motihari Municipality,* A.I.R. 1937 Pat. 352, followed.

Where an accused was sentenced to pay a fine with simple imprisonment for a period in default of payment for failure to pay the sales tax and at the same time he was directed to pay a further fine of five rupees for every day of default after the date fixed by the Magistrate for the payment of the tax,

Held, that the part of the order that related to imposition of a fine at the rate of Rs. 5 per day of future default should be set aside.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Trichinopoly, dated 19th May, 1941 and made in C.C. No. 45 of 1941 on its file.

G. Gopalaswami for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been convicted on his own plea of 'guilty' of an offence punishable under section 15 of the Madras

*Crl.R.C. No. 560 of 1942. 5th November, 1942.
(Crl.R.P. No. 533 of 1942).

Abdul Sathar Sahib, *In re.*

General Sales Tax Act, in respect of his failure to pay the tax due from him within the time allowed. The learned Magistrate sentenced him to pay a fine of Rs. 50 with simple imprisonment for one month in default of payment and at the same time he was directed to pay a fine of Rs. 5 for every day of default with effect from 28th May, 1941, the date fixed by the Magistrate for the payment of the tax. The petitioner's contention is that the section confers no power on the Magistrate to impose a fine in anticipation of an offence being committed although he has jurisdiction to calculate the fine payable for a particular offence on the basis of a daily penalty. In support of this argument the petitioner's learned advocate relies on the decision in *Haluman Sah* v. *Motihari Municipality*.[1] In that case an accused was ordered to pay a fine of one rupee per day until the offending encroachment in respect of which he had been convicted was removed. Although the learned Public Prosecutor has attempted to support the order, he has been unable to cite any authority which runs contrary to the view expressed by Agarwala, J., in the case referred to. I agree with the petitioner's learned advocate that there is no power to impose a fine in anticipation of an offence being committed. In the result the petition is allowed and that part of the order which relates to the imposition of the fine at the rate of Rs. 5 per day of default is set aside.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE HAPPELL.

Chittoori Venkataraju and others .. *Appellants** (*Respts.*)

v.

Chekka Suryanarayana Receiver to the estate of the late Rao Bahadur Pydah Venkatachalapathi Garu .. *Respondent* (*Petr.*).

Venkataraju *v.* Surya-narayana.

Civil Procedure Code (V of 1908), *section* 144 *and Order* 21, *rule* 63—*Suit under rule* 63—*Order on claim petition set aside—Restitution of costs paid in petition—Starting point of limitation—Limitation Act (IX of* 1908), *Article* 182.

A suit brought under Order 21 rule 63, Civil Procedure Code, cannot be dissociated from the claim petition which gives rise to it and is in fact an action in the nature of an appeal from the order passed on the claim petition. And where the order on the claim petition is reversed by the decree in the suit the successful party is entitled to restitution of the costs of the claim petition which he had paid to the other party.

Bibi Phul Kumari v. *Ghanshyam Misra*, (1907) 17 M.L.J. 618: L.R. 35 I.A. 22: I.L.R. 35 Cal. 202 (P.C.) and *Nagendranath De* v. *Sureshchandra De*, (1932) 63 M.L.J. 329; L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.), relied on.

Where the successful party to a suit under Order 21, rule 63 of the Code, applies for restitution of the costs of the claim petition paid by him the starting point of limitation under Article 182 of the Limitation Act is the date of the decree in the suit and not the date of the order on the claim petition.

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1. A.I.R. 1937 Pat. 352.

*A.A.O. No. 105 of 1941. 27th August, 1942.

Venkataraju v. Suryanarayana.

Appeal against the order of the Court of the Subordinate Judge of Coconada, dated 13th March, 1940, in E.P. No. 386 of 1939 in O.S. No. 58 of 1933.

K. Bhimasankaram for Appellants.

D. Narasaraju and *N. Vasudeva Rao* for Respondent.

The Judgment of the Court was delivered by

Happell, J.

Happell, J.—The appellants in this Civil Miscellaneous Appeal obtained a decree in O.S. No. 58 of 1933 and in execution of that decree attached two items of movable properties. In respect of these properties, the receiver to the estate of Pydah Venkatachalapathi filed two claim petitions, E.A. Nos. 945 and 1152 of 1933. Both these petitions were dismissed with costs on the 5th March, 1934, and the receiver who is the respondent in this appeal paid their costs to the appellants. He, however, filed suits under Order 21, rule 63 of the Civil Procedure Code, O.S. Nos. 150 and 149 of 1934, to have the orders on the claim petitions set aside. These suits were decreed in his favour and appeals by the present appellants failed. The decrees in the suits which were confirmed by the appellate Court set aside the orders on the claim petitions and gave the respondent the declaration of title for which he prayed and the costs of the suits. No mention, however, was made in the decrees of the costs incurred in the claim petitions. The respondent, however, filed the petition, E.P. No. 386 of 1939, out of which this appeal arises for restitution of the costs paid by him to the appellants in obedience to the orders passed on the claim petitions. The learned Subordinate Judge of Coconada allowed this petition. He observed that section 144 of the Civil Procedure Code, was not confined to cases where the orders are reversed "only in further stages like appeal, etc., but that it applies to any reversal." He observed also that "the scheme of the provisions under Order 21, rule 58 and rule 63 is that when once a suit under Order 21, rule 63 succeeds, it must be taken automatically that the claim order is vacated. So viewed, the petitioner would be entitled to restitution the moment his suit succeeds".

It is argued for the appellants that the order of the learned Subordinate Judge is wrong since a suit under Order 21, rule 63 is a proceeding independent of the claim petitions and, if successful, does not in substance set aside the order on the claim petition concerned, although in form the decree may be expressed to be that the order on the claim petition is set aside. Order 21, rule 63 reads:

> "Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

For the interpretation he puts on the order, learned counsel for the appellant relies on a decision of Devadoss, J., sitting alone, reported in *Raman Nair* v. *Raman Menon*.[1] The suit with which the second appeal decided by Devadoss, J., was concerned had been brought under Order 21, rule 63 of the Civil Procedure

1. (1924) 20 L.W. 867.

Code and provided that the costs incurred by the plaintiff in the claim proceeding should be paid to him. Devadoss, J., allowed the appeal, holding that a decree in a suit under Order 21, rule 63 could not provide for costs incurred in the claim petition for the reason that the suit contemplated by rule 63 is a suit for a declaration of the claimant's right and the rule does not say that the claim order will be vacated by reason of the judgment in the suit. It is true that Order 21, rule 63 does not provide expressly that the claim order shall be vacated by reason of the judgment in the suit but, with great respect that, in our opinion, is the effect of the order. A suit under Order 21, rule 63 is not brought without reference to the order on the claim petition, and although what the rule states is that "subject to the result of such suit, the order shall be conclusive", it is clear that, conversely, if the suit ends in favour of the party preferring it the order ceases to be conclusive. It is not therefore easy to see what is the difference between an order on a claim petition which ceases to be conclusive by virtue of the judgment in a suit brought under Order 21, rule 63 and an order which is set aside. This view, in our opinion, receives support from two decisions of the Privy Council. In *Bibi Phul Kumari* v. *Ghanshyam Misra*[1], the question related to the court-fee payable by an unsuccessful claim petitioner on her suit under Order 21, rule 63. Their Lordships held that court-fee was payable under Article 17 of Schedule II of the Court-Fees Act, which applies to "a plaint or memorandum of appeal" in each of the following suits:—"(1) to alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent or of any revenue Court", and Lord Robertson who delivered the judgment of the Board observed that this was an exact description of the effect of the appellant's suit. Moreover, in considering what provision of the Court-Fees Act was applicable, their Lordships referred to the suit under Order 21, rule 63, which was the subject-matter of the appeal as "such actions of appeal", and again later in the judgment observed that "misled by the form of action directed by section 283" (now Order 21, rule 63) "both parties treated the action as if it were not simply a form of appeal, but as if it were unrelated to any decree forming the cause of action."

Again, in *Nagendranath De* v. *Sureshchandra De*[2], where the questions related to the starting point of limitation and the meaning of the word "appeal" "for the purposes of Article 182 (2) of the Limitation Act", their Lordships, observing that there was no definition of "appeal" in the Code of Civil Procedure, stated that they had no doubt that any application by a party to an appellate Court asking it to set aside or revise the decision of a subordinate Court is an appeal within the ordinary acceptation of the term.

We therefore can have no doubt that a suit brought under Order 21, rule 63, cannot be dissociated from the claim petition

1. (1907) 17 M.L.J. 618: L.R. 35 I.A. 22: I.L.R. 35 Cal. 202 (P.C.).
2. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).

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which gives rise to it and is in fact an action in the nature of an appeal from the order passed on the claim petition. Section 144 of the Civil Procedure Code provides that,

"where and in so far as a decree is varied or reversed, the Court of First Instance shall . . . cause such restitution to be made . . ."

The section does not provide that for an order of restitution to be made the decree must have been varied or reversed in any particular form of proceeding or by any particular Court, and the learned Subordinate Judge has rightly stated that section 144 is not confined to cases where the orders are reversed on appeal (vide *Subbarayudu* v. *Yerram Setti Seshasani*[1]). We are of opinion, therefore, that the orders passed on the claim petitions were reversed by the decrees in the suits, and that consequently, the respondent to this appeal was rightly held by the Subordinate Judge to be entitled to restitution of the costs of the claim petition which he had paid to the appellants. The question of the costs in the claim petitions was not specifically raised in the suits under Order 21, rule 63, but the reversal of an order or decree automatically entitles the successful party to restitution of the costs paid to the unsuccessful party in the earlier proceeding. Different considerations would arise if the respondent-petitioner had been seeking to recover his own costs since no issue on the question was raised in the suits and no provision was made for the payment of such costs in the decrees. The respondent, however, did not ask for his own costs.

It has also been urged for the appellants that the application for restitution was in any case barred by limitation since it was filed more than three years after the orders passed on the claim petitions. This contention, in our opinion, is not one that can be of any advantage to the appellants since it can only succeed if the suit under Order 21, rule 63 is an action quite distinct from the claim petitions so that an application for restitution of costs paid would in any event be disallowed. In the view that we hold of the nature of the suit under Order 21, rule 63 and its relation to the claim petitions, there can be no doubt that under Art. 182 of the Limitation Act, the starting point of limitation will be the date of the decree in the suit or if there is an appeal from that decree the date of the final orders on the appeal. In the result, therefore, the appeal fails and is dismissed with costs.

B.V.V. —— *Appeal dismissed.*

THE FEDERAL COURT OF INDIA.

[*Appellate Jurisdiction.*]

(On appeal from the Judicial Commissioner's Court, Peshawar.)

PRESENT:—SIR MAURICE GWYER, *Chief Justice*, VARADACHARIAR AND ZAFRULLA KHAN, JJ.

F.C.

Suraj Narain Anand v. N.-W.F. Province.

Suraj Narain Anand .. *Applicant**

v.

The North-West Frontier Province .. *Respondent.*

Government of India Act (1935), section 205—Scope—Decree on remand by Federal Court finally disposing of the appeal—Complaint against

1. (1916) 30 M.L.J. 366: I.L.R. 40 Mad. 299.
*Case No. 12 of 1942. 21st October, 1942.

—Cannot be entertained by Federal Court without a fresh appeal before it —No inherent power to interfere with such decree.

Any complaint against a decree of the Court below passed after a remand by the Federal Court finally disposing of the appeal can be entertained by it only on an independent appeal under section 205 of the Constitution Act. It is only in dealing with an appeal properly before it that the Federal Court may have certain inherent powers. But where there is no such appeal the Federal Court has no inherent power to interfere with the decree of the Court below.

Applicant in person,

The case was fixed for *ex parte* hearing.

The Judgment of the Court was delivered by

Varada-chariar, J.

Varadachariar, J.—The petitioner was the appellant in an appeal which was before this Court (*Suraj Narain Anand* v. *The North-West Frontier Province*). On 4th December, 1941, this Court disposed of that appeal, holding that the plaintiff was entitled to a declaration that he had not been effectively dismissed from office, and that he was entitled to his costs in this Court. As the suit had not been tried on the merits, the Court had to remit the case to the Judicial Commissioner's Court for such "further directions as the circumstances of the case may require"; it was also left to the Judicial Commissioner's Court to deal with the costs of the proceedings in the Courts below. On receipt of this Court's judgment, the Judicial Commissioner's Court remanded the case to the trial Court to hear and determine the plaintiff's claim to arrears of pay. The trial Court passed a decree for Rs. 1,648 for arrears of pay and gave certain directions as to payment of costs, court-fee, etc. The plaintiff carried the matter again on appeal to the Judicial Commissioner's Court and that Court increased by a few hundreds the amount awarded to the plaintiff. It has made clearer and more specific the directions in the decree as to costs and payment of court-fee.

The petitioner has now filed in this Court what purports to be an application under Order 43 of the Federal Court Rules and he therein asks this Court to vary the decree of the Judicial Commissioner's Court in certain particulars. This, he prays, should be done in exercise of the inherent powers of this Court. We are unable to hold that this Court has any jurisdiction to entertain this application. It is true that when this Court is properly seised of an appeal on a certificate granted under section 205 of the Constitution Act, it will also have jurisdiction to deal with other questions arising in the case; and in dealing with an appeal properly before it, it may have certain inherent powers. But before these powers can be exercised there must be an appeal validly instituted in this Court. In the present case, there was no doubt at one time an appeal before us properly preferred under section 205; but that appeal has been finally disposed of so far as this Court was concerned. The petitioner suggested that the Judicial Commissioner's Court has not properly understood or given effect to the directions contained in the judgment of this Court. We see no basis for this suggestion. Any complaint against the decree passed by the Judicial Commissioner's Court after the remand can, in our opinion, be enter-

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Suraj Narain Anand v. N.-W.F. Province.

Varadachariar, J.

tained by this Court only on an independent appeal under section 205 of the Constitution Act; and such an appeal must satisfy the requirements of that section. In this case no certificate under that section has been given or obtained. We may also add that it has not been shown to us that any constitutional question arises at this stage at all.

The petitioner's principal objections to the decree of the Judicial Commissioner's Court relate—

(1) to the amount awarded to him for arrears of pay; and

(2) to the directions as to costs and payment of court-fee.

There appears to be some force in his complaint that arrears of pay should have been awarded to him not merely up to the date of the institution of the suit, but to the date of a valid order of dismissal. We are however not in a position to say whether this point was urged before the Judicial Commissioner or why the award has been so limited. As the claim relates to a period subsequent to the institution of the suit, the petitioner may have a separate remedy in respect of the same. But this involves no constitutional question and we do not see how this Court is entitled to deal with it at this stage. The direction as to costs is within the discretion of the Court and the direction as to the payment of the court-fee has not even been shown to be improper except as to the method of calculating the amount payable. Though it is not open to this Court to give the plaintiff any relief on the question of court-fee, we think it right to point out that the calculation of the court-fee, so far as we are able to gather from the papers before us, is open to exception. The plaint claimed a declaration and a decree for damages for Rs. 75,000; alternatively, a claim for arrears of pay was made. In the Courts below, court-fee seems to have been calculated on the footing that the case fell under section 17 of the Court-Fees Act as one embracing two distinct causes of action. On a correct reading of the plaint, it seems to us that the case was one in which alternative reliefs were claimed on the same cause of action, *either* for Rs. 75,000 by way of damages on the ground of wrongful dismissal or for Rs. 2,500 for arrears of pay, on the footing that there has been no effective dismissal. On this interpretation of the plaint, the court-fee payable would only be a fixed fee for the declaratory relief and *ad valorem* fee on the higher of the alternative reliefs, namely, the claim for Rs. 75,000. We have no doubt that the plaintiff's grievance in respect of the arrears of pay for the period between the date of the institution of the suit and the date of his valid dismissal as well as the excess court-fee charged against him will be remedied by the Government now that we have drawn their attention to it.

With these observations the petition is dismissed.

K.S. —— *Petition dismissed.*

THE FEDERAL COURT OF INDIA.

[*Appellate Jurisdiction.*]

F.C.

Megh Raj *v.* Allah Rakhia.

PRESENT:—SIR MAURICE GWYER, *Chief Justice*, VARADACHARIAR AND ZAFRULLA KHAN, JJ.

Megh Raj and another .. *Applicants**

v.

Allah Rakhia and others .. *Respondents.*

Government of India Act (1935), *section* 208 (b)—*Federal Court—Decision involving constitutional questions—Leave to appeal to His Majesty in Council—Granted only in exceptional cases.*

The Federal Court will not entertain an application for leave to appeal to His Majesty in Council against its decision on the ground only that the applicant is of opinion that its decision was wrong and still less for the purpose of enabling him to "try his luck" before yet one more tribunal. On general grounds of public policy litigation in the form of appeals to several Courts should be restricted rather than extended. The Federal Court is the first Court sitting on Indian soil whose jurisdiction extends to the whole of British India and it is not subordinate to any other Court.

Since the primary responsibility for determining constitutional cases which fall under section 208 (*b*) of the Indian Constitution Act lies on the Federal Court itself it ought not without grave reason to attempt to shift that responsibility on to others. The Court will not encourage Indian litigants to seek for determination of constitutional questions elsewhere than in their own Supreme Court; and leave to appeal in such cases will be granted sparingly and only in exceptional cases.

Case No. VI of 1942.

Rai Bahadur Harish Chandra (*Radhe Mohanlal*, with him) instructed by *Ganpat Rai*, Agent for Applicants.

M. Sleem, Advocate-General of the Punjab (*Khan Sahib Mohammad Ameen*, with him) instructed by *Tarachand Brijmohanlal*, Agent for Respondents.

Case No. VII of 1942.

Kripa Narain (*Radhe Mohanlal*, with him) instructed by *Tarachand Brijmohanlal*, Agent for Applicants.

Jafer Imam, Advocate-General of Bihar (*C. P. Sinha*, with him) instructed by *T. K. Prasad*, Agent for Respondents.

Case No. IX of 1942.

M. Sleem, Advocate-General of the Punjab (*Khan Sahib Mohammad Ameen*, with him) instructed by *Tarachand Brijmohanlal*, Agent for Applicants.

Rai Bahadur Harish Chandra (*Radhe Mohanlal*, with him) instructed by *Ganpat Rai*, Agent for Respondents.

Case No. X of 1942.

C. Krishnaswami, instructed by *Ganpat Rai*, Agent for Applicants.

Sir Alladi Krishnaswami Aiyar, Advocate-General of Madras (*N. Rajagopala Aiyangar*, with him) instructed by *B. Banerji*, Agent for Respondents.

The Judgment of the Court was delivered by

Gwyer, C.J.

Gwyer, C.J.—These are four applications for leave to appeal to His Majesty in Council from decisions of this Court. The

*Case Nos. 6, 9, 7 and 10 of 1942. 21st October, 1942.

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Megh Raj v. Allah Rakhia.

Gwyer, C.J.

cases concerned all dealt with important issues. In the first, the validity of the Punjab Restitution of Mortgaged Lands Act (No. IV of 1938) was challenged. In the second, it was contended that the Punjab land alienation legislation offended against those provisions of the Constitution Act which prohibit certain kinds of discriminatory legislation. In the third case, from Patna, the Bihar Agricultural Income-tax Act (No. VII of 1938) was said to conflict with the principles underlying the Permanent Settlement. And in the fourth, which came from Madras, the question whether the Provincial Legislature and Government had the right to levy a sales tax on the first sale by a manufacturer of goods manufactured by him (which had been left open in a previous decision of this Court) was finally determined in favour of the Province. It may be conceded that the decision in all four cases will affect a large number of persons and substantial interests, and that important questions of law were involved in them.

We were invited to lay down rules by which our discretion in granting or refusing leave to appeal would be governed. We must decline thus to fetter the exercise of it. We shall continue to treat each case on its own merits, but we repeat what we have said before, that we will not entertain an application for leave to appeal on the ground only that the applicant is of opinion that our decision was wrong, and still less for the purpose of enabling him, in the phrase used by counsel in one of the cases, to "try his luck" before yet one more tribunal. On general grounds of public policy litigation in the form of appeals to several Courts should be restricted rather than extended; but other considerations also have weighed with us.

Sir Alladi Krishnaswami Aiyar, who opposed the application in the Madras case and to whose argument as well as to that of Mr. Krishnaswami, counsel for the applicants, we are much indebted, based his contention upon the analogy of section 74 of the Australian Constitution, which forbids an appeal to His Majesty in Council from a decision of the High Court of Australia on certain constitutional issues, unless the High Court certifies that the question is one which ought to be determined by His Majesty in Council, and empowers the High Court so to certify, "if satisfied that for any special reason the certificate should be granted". So far as we are aware, in one case only has a certificate been granted under this section by the High Court: *A.-G. for the Commonwealth of Australia* v. *The Colonial Sugar Refining Co.*[1], a case in which the Judges were equally divided in opinion, so that the Court in effect gave no decision and an authoritative pronouncement by some other tribunal became necessary. We have in an earlier case uttered a word of warning on the danger of applying decisions on one constitutional enactment to the interpretation of another; but an examination of the Australian decisions shows how strongly the High Court of Australia holds the view that since the primary responsibility for

1. (1914) 17 C.L.R. 645.

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determining the constitutional cases which fall under section 74 lies upon itself it ought not without grave reason to attempt to shift that responsibility on to others.. In view of the similarity between section 75 and section 208 (*b*) of the Indian Constitution Act, we think it right to take note of the principle of the Australian decisions, even though we may be less rigid in applying it.

The Federal Court has not as yet the wide jurisdiction of the High Court of Australia, nor does India, whatever her hopes may be, yet possess the same political status as the Australian Commonwealth. But this Court is the first Court sitting on Indian soil whose jurisdiction, limited though it may be at present, extends to the whole of British India. Its establishment marked a new stage in India's constitutional evolution; and the evolution of Indian political thought of which we cannot pretend to be unaware, even since we last heard an application for leave to appeal has served only to increase and emphasize the significance of its authority. It is not subordinate to any other Court; and it is plain that this conception of its status was present in the minds of those who framed the present constitution when they gave to the Court itself the right to say whether it would permit any cases which came before it on appeal to be reviewed elsewhere. The ancient prerogative right of His Majesty to grant special leave to appeal, though it has now been made statutory by section 208 (*b*), does not affect this aspect of the matter.

Mr. Krishnaswami in the course of his argument referred to certain observations which fell from Lord Haldane in *Hull* v. *M'Kenna*[1], an application for special leave to appeal from the High Court of the Irish Free State to His Majesty in Council. Lord Haldane pointed out that though the Judicial Committee act in a strictly judicial capacity in advising the Crown whether or not special leave to appeal should be granted, nevertheless in the case of appeals from the Dominions the general sense of the Dominion is taken into account and the Judicial Committee, in Lord Haldane's phrase, "go upon the principles of autonomy on this question of exercising the discretion as to granting leave to appeal". No doubt a distinction is to be drawn between the functions of the Judicial Committee in advising His Majesty and the functions of this Court in granting leave to appeal; but Lord Haldane's observations have a more general application, and for the reasons given above we are not disposed to encourage Indian litigants to seek for the determination of constitutional questions elsewhere than in their own Supreme Court. We do not and indeed we cannot lay down a rule that we will never grant leave to appeal, for that would be to alter the provisions of the Act and to usurp legislative functions, but we shall grant it sparingly and only in exceptional cases.

Applying the above considerations to the cases which are now before us, there can be no reason for the grant of leave to appeal in the cases from Patna and Madras, where the questions at issue were clear cut and straightforward and we entertained no doubts on any one of them. The two cases from the Punjab were

1. (1926) I.R. 402.

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of greater complexity. The defects in the Act under consideration in the first of them, to some of which we drew attention in our judgment, certainly do not diminish the difficulties of interpretation with which we were faced; and the lack of unanimity among the members of the Court may itself be taken to indicate the existence of similar difficulties in the second. Nevertheless it does not seem to us that these circumstances by themselves justify the grant of leave to appeal. The Court had in the words of the High Court of Australia, to accept the responsibility of deciding the two appeals, however difficult it may have found its task; and there is no reason why it should suggest that it feels any lack of confidence in the correctness of the decisions at which it has arrived.

The four applications are dismissed. The applicant must in each case pay the costs of the application.

K.S. — *Applications dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KRISHNASWAMI AYYANGAR.

S. Srirama Raja and others .. *Appellants**
(*Defts.* 1, 3 & 4)

v.

The Secretary of State for India in Council, now the Province of Madras, represented by the Collector of Chingleput District .. *Respondent*
(*Plaintiff*).

F. B.
Srirama Raja
v.
Secretary of State for India in Council.

Contract Act (I of 1872), section 70—Co-owner of tank carrying out repairs—Right to recover contribution from the other owners.

In a suit by the Secretary of State for India in Council for recovery of money by way of contribution from a shrotriemdar who was the co-owner of an irrigation tank with the Government in respect of repairs done to it,

Held, that in carrying out the repairs the Government had acted lawfully, that it had not intended to carry them out gratuitously and that the defendant had enjoyed the benefits of the repairs which were necessary and but for which his lands would have suffered. All the conditions of section 70 of the Contract Act having been fulfilled the Government is entitled to recover contribution from the shrotriemdar.

Though under the English law the defendant would not be liable the provisions of section 70 of the Indian Contract Act are wider than the English law and therefore the defendant is liable to contribute.

Saptharishi Reddiar v. *Secretary of State for India in Council*, (1915) 28 M.L.J. 384, reaffirmed and followed.

Appeal against the decree of the District Court of Chingleput in A.S. No. 128 of 1938, preferred against the decree of the Court of the District Munsiff of Chingleput in O.S. No. 330 of 1935.

V. V. Srinivasa Aiyangar, N. R. Raghavachari, and *V. R. Venugopalan* for Appellants.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

*S.A. No. 500 of 1941. 25th September. 1942.

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Srirama Raja *v.* Secretary of State for India in Council.

[This second appeal coming on for hearing, the Court (*Kuppuswami Ayyar, J.*) made the following]

ORDER.

27th July, 1942.

The appeal arises out of a suit filed by the Secretary of State for India in Council for recovery of money claimed by way of contribution from the co-owner of a Hissa Tank, the shrotriemdar of Pudupakkam. The repairs were effected in 1913. The shrotriemdar denied his liability to contribute even before the repairs were effected when the estimate and plan with regard to the repairs were sent to him though he had no objection to the estimate. The suit was decreed in both the lower Courts and defendants 1, 3 and 4 have filed this second appeal.

It is contended for the appellants that it cannot be said in this case (1) that the repairs were effected for the shrotriemdar and (2) that he had an opportunity to accept or refuse to receive the benefit of the repairs. When the appeal was taken up, Mr. V. V. Srinivasa Aiyangar, the learned counsel for the appellants, said that in view of the conflicting decisions of this Court, it may be heard by a Bench. He quoted the decision in *Lakshmanan Chettiar* v. *Arunachalam Chettiar*[1], where Curgenven, J., has dealt with the rulings relating to cases coming under section 70 of the Indian Contract Act. The learned Government Pleader conceded that there are conflicting decisions in this Court and was not averse to the case being heard by a Bench. I think in view of the conflict of decisions and the importance of the question, it is better that the second appeal is heard by a Bench of Judges.

The papers will be placed before His Lordship the Chief Justice for orders.

(This second appeal coming on for hearing in pursuance of the aforesaid Order, the Court delivered the following)

Leach, C.J.

JUDGMENT: *The Chief Justice.*—The appellants are the shrotriemdars of Pudupakkam in the Chingleput district. Their lands are watered from a tank at Padur. Padur is a Government village and shares with Pudupakkam the water of this tank. In other words, the tank is owned jointly by the appellants and by the Government. In 1913 the tank was in need of repair and the Collector caused an estimate to be prepared. The shrotriem ayacut watered by this tank measures 454·10 acres and the Government ayacut measures 554·94 acres. The total cost, according to the estimate, was Rs. 3,630, and the appellants' share came to Rs. 1,633-9-10. On the 20th November, 1913, the Collector wrote to the appellants stating that the proportionate share payable by them in respect of the cost of the repairs to the tank was Rs. 1,633-9-10, and a copy of the estimate was sent to them. They were requested to pay the amount in the treasury and if they had any objections to offer to state those objections within a month. The appellants replied to this letter on the 17th December, 1913. They did not object to the estimate or to the

1. (1931) 34 L.W. 859.

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work being carried out, but they objected to making any contribution to the cost of the repairs. They stated that repairs to the tank had been undertaken twice before and they had not been called upon to pay anything. They also considered that as they had paid the water cess for the second crop which for the previous ten years averaged from Rs. 60 to Rs. 70 it was unjust of the Government to make any demand in connection with the repairs which were to be undertaken. On the 27th August, 1914, the Collector addressed a further communication to the appellants. This document has not been exhibited, but it apparently required them to pay the Rs. 1,633-9-10. On the 17th September, 1914, the appellants replied to this further demand on the lines of their letter of the 17th December, 1913. The repairs were completed by the month of April, 1918, but no further demand was made upon the appellants until the 13th March, 1934. The matter had apparently been overlooked in the meantime.

On the 30th October, 1935, the Government instituted in the Court of the District Munsiff of Chingleput the suit which has given rise to this appeal, claiming the payment of the sum of Rs. 1,345 which was the proportionate share of the appellants of the actual cost of the repairs. The claim of the Government was not subject to the law of limitation and the District Munsiff heard and decided the case on its merits. The District Munsiff considered that the appellants were liable and consequently decreed the suit. The appellants appealed to the District Judge who concurred in the judgment of the District Munsiff on the ground that the case was governed by the decision of this Court in *Saptharishi Reddiar* v. *Secretary of State for India*[1] Thereupon they appealed to this Court. The case came before Kuppuswami Ayyar, J., who considered that there were certain decisions of this Court in conflict with the judgment relied on by the District Judge and therefore it was desirable that the case should be heard by a Bench.

The facts in *Saptharishi Reddiar* v. *Secretary of State for India*[1] are identical with the facts of this case. There, Ayling and Tyabji, JJ., held that the defendants who owned a tank jointly with the Government were liable to contribute to the cost of repair by reason of the provisions of section 70 of the Indian Contract Act. The Court recognised that the provisions of this section are wider than the English law. Under the English law the defendants would not be liable, but the Court could only have regard to the Indian statute law and the section made them liable to contribute.

Section 70 of the Indian Contract Act reads as follows:—

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

Therefore when a person lawfully does something for another person and does not intend to do so gratuitously the other person

1. (1915) 28 M.L.J. 384.

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is bound to pay compensation if he enjoys the benefit of what has been done.

In *Saptharishi Reddiar* v. *Secretary of State for India*[1], it was held that in carrying out the repairs the Government had acted lawfully, that it had not intended to carry them out gratuitously and that the defendants had enjoyed the benefits of the repairs. That is exactly the position here. It is not suggested that in carrying out the repairs the Government was doing something which was unlawful. It is not denied that the repairs were necessary, and it is obvious that if they had not been carried out the appellants' lands would suffer. In fact without the water they would not be capable of cultivation and as the result of the repairs they have had the benefit of water drawn from this tank. We agree with the decision in *Saptharishi Reddiar* v. *Secretary of State for India*[1]. All the conditions of section 70 have been fulfilled in the present case and the Court must, in these circumstances, award compensation to Government.

We have examined the cases which Kuppuswami Ayyar, J., had in mind when he referred this appeal to a Bench. In some of these cases there are observations which would be in conflict with *Saptharishi Reddiar* v. *Secretary of State for India*[1], if the facts were the same, but the facts in the other cases were very different and we do not consider that it is necessary to go beyond *Saptharishi Reddiar* v. *Secretary of State for India*[1]. For instance, there has been much discussion on the meaning of the word "enjoys" in section 70. Here, there can be no doubt that the appellants have enjoyed the benefit of the work done by Government and this being the case they must contribute to the cost of the work which Government has carried out. Consequently we hold that the suit was rightly decided by the Courts below.

A regrettable feature about this case is the delay which has taken place in the enforcement of payment. It is certainly hard on the appellants that the Government should have left matters in abeyance for so long. The Government has however chosen to enforce the claim and, as the law stands, it is entitled to a decree, but in dismissing the appeal we grant no costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KUNHI RAMAN.

South Indian Railway Co., Ltd. *v.* Mayilvahanan.

The South Indian Railway Company, Limited, by its Agent at Trichinopoly .. *Appellant**

v.

M. C. Mayilvahanan .. *Respondent.*

Stay in appeal—Deposit of amount in Court—Unconditional withdrawal permitted with respect to costs—Security ordered in respect of the remainder—Notice of deposit of amount to respondent—Till date of notice interest claimable—Interest from that date up to withdrawal not recoverable.

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1. (1915) 28 M.L.J. 384.

*A.A.O. No. 424 of 1941. 20th August, 1942.

South Indian Railway Co., Ltd. v. Mayilvahanan.

The South Indian Railway Company against whom a decree had been passed filed an appeal in the High Court and applied for stay of execution. Interim stay was ordered by the Court on 16th February, 1938, on the Company depositing the decree amount in Court which order was confirmed on 22nd April, 1938. The respondent was permitted to withdraw unconditionally the sum which represented costs and in respect of the remainder was ordered to furnish security before drawing the amount from Court. It was not until the company's appeal had been dismissed that the respondents applied to withdraw the decree money. In the application, that sum with interest up-to-date of application was claimed.

Held, (1) that interest would continue to run from the date of the deposit until the date when notice of the deposit was given to the decree-holder.

Ramaraya Shanbogue v. *Sherbott Venkataramanayya*, (1919) I.L.R. 42 Mad. 576, followed.

(2) That the company having deposited the amount in 1938 and having asked for security to be taken mainly on the ground that the respondent was a minor, should not be called upon to pay interest for the subsequent period because the next friend of the minor was unable to furnish the security which was necessarily ordered by the Court.

Appeal against the order of the Court of the Subordinate Judge, South Malabar, dated 16th November, 1940 in E.P. No. 588 of 1940 in O.S. No. 14 of 1935.

S. S. Ramachandra Aiyar for Appellant.

S. R. Subramanian for Respondent.

The Judgment of the Court was delivered by

King, J.

King, J.—The appellant here is the South Indian Railway Company against whom a decree had been passed in O.S. No. 14 of 1935 on the file of the Subordinate Judge's Court of South Malabar. The company filed an appeal in the High Court and applied for stay of execution. It was ordered by this Court to deposit the amount of the decree. This was done on 16th February, 1938, and an order granting interim stay was passed. This order was confirmed on the 22nd April, 1938, and the respondent was permitted to withdraw unconditionally the amount of the deposit which represented the costs awarded by the decree. In respect of the remainder of the sum the Court ordered that withdrawal could take place only on furnishing security. The amount of costs was accordingly withdrawn some months later, but no security was ever furnished and it was not until the appeal of the Railway Company had been dismissed that the respondent applied for the decree money. Application was made for that sum with interest up to the date of the application, that is, in August, 1940. The learned Subordinate Judge held that this application was good and ordered it. The Railway Company now appeals on the ground that there should have been no order for interest.

The period in question is from February, 1938 to August, 1940 and it falls logically into two well-defined periods. The first is one of a little over two months until the date of the final order upon the petition for stay. It seems to us that the appeal must fail in regard to this period. Order 21, rule 1, under the provisions of which the money was paid into Court lays it down

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King, J.

that notice of such payment shall be given to the decree-holder. It has been held by this Court in *Ramaraya Shanbogue* v. *Sherbott Venkataramanayya*[1] that interest will continue to run from the date of the deposit until the date when that notice is given. We have now been referred by the learned advocate for the appellant to a ruling from Nagpur, *Lakshmi Narayana* v. *Ghasiram*[2] in which *Ramaraya Shanbogue* v. *Sherbott Venkataramanayya*[1] is dissented from, mainly on the ground that in an intervening decision the Privy Council had laid it down that in a particular case, payment into Court was equivalent to payment to the decree-holder. No doubt that was so upon the facts of the particular case which has been dealt with by the Privy Council. But we do not think their Lordships were laying down any general principle to be applied to all kinds of deposits in all kinds of circumstances, and that ruling, we think, cannot be utilised as authority overruling *Ramaraya Shanbogue* v. *Sherbott Venkataramanayya*[1]. We accordingly still consider ourselves bound and with due respect prefer to follow *Ramaraya Shanbogue* v. *Sherbott Venkataramanayya*[1]. Interest therefore could not cease to run before the 22nd April, 1938.

There then remains the much longer period from April, 1938 to 1940. The learned Judge has in this matter followed three rulings, one in Calcutta, one in Nagpur and one in Lahore and may very possibly in a normal case have correctly followed those rulings. It seems reasonable to say that when at the instance of an appellant who pays money into Court the respondent is hampered in his attempts to obtain payment of that money into his hands, it is the conduct of the appellant which eventually prevents him from getting the money and the appellant therefore should continue to pay interest as the result of his conduct. Normally, we suppose, when in cases of this kind appellants deposit money and try to persuade the Court that the money should not be paid except upon conditions to their opponents, they do so in order to make their own recovery of the money more easy if they should succeed in appeal. But the facts here are different. The respondent was a minor and the provisions of Order XXXII, rule 6 are explicit and peremptory; so that even if the Railway Company had not made any reference to the question of taking security the Court was still bound to pass some such order as it did in fact pass. In these circumstances we can see no logical principle upon which the Railway Company, having deposited the money in 1938 and having so far as we can see asked for security to be taken mainly on the ground that the respondent was a minor, should now be called upon to pay interest because the respondent's next friend has been unable to furnish the security which was necessarily ordered by the Court. In these circumstances we think that in respect of the second period the appeal must succeed and that interest must cease to run from the 22nd April, 1938. The appeal will be allowed to this extent and the parties will give and take proportionate costs throughout.

K.C. ——— *Appeal allowed in part.*

1. (1919) I.L.R. 42 Mad. 576.
2. A.I.R. 1939 Nag. 191.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Vijiyalakshmi Ammal ..*Petitioner** (*Petitioner in both*)

v.

Rangachariar .. *Respondent* (*Respondent in both*).

Vijiyalakshmi Ammal v. Rangachariar.

Madras Agriculturists' Relief Act (IV of 1938), sections 7, 9 and 10 (2) (ii)—Declaration of amount, what is—Right of appeal against—Vendor's lien—Purchase of mortgaged property—Provision of a charge under Transfer of Property Act (IV of 1882)—Whether Act (IV of 1938) could be invoked in application.

A decision that a debt was immune from reduction under the Madras Agriculturists' Relief Act, is not one which can be deemed to be a declaration of the amount of the debt and hence no appeal would lie to a higher tribunal from such decision.

Where at the time when a debt under a mortgage was contracted for the balance of the purchase price of land, the vendor's lien existed and there was nothing to show that the lien had been terminated by any act of the vendor.

Held, that section 10 (2) (*ii*) of the Act could be invoked even if the vendor's lien might not subsist at the time when the debt was enforced, because the exclusion of such liabilities from the operation of the Act depended not on the actual subsistence of the charge but on the question whether in the beginning the liability was one in respect of which such a charge was provided by the Transfer of Property Act.

Varadaraja Perumal Pillai v. *Palanimuthu Goundan*, (1940) 2 M.L.J. 838, relied on.

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the orders of the District Court of Chingleput and the Court of the District Munsiff of Chingleput, dated 27th January, 1941 and 4th November, 1940 and made in unnumbered appeal bearing Serial No. 138 of 1941 in Civil Register No. 17 and in O.P. No. 71 of 1940, respectively.

S. Ramachandra Aiyar and *S. Natarajan* for Petitioner.

R. Gopalaswami Aiyangar for Respondent.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—These two civil revision petitions both arise out of an application for a declaration of the amount of a debt under the rules framed by the local Government in G.O. No. 2634, Development, dated 27th October, 1939, under section 28 (2) of Madras Act IV of 1938. C.R.P. No. 497 of 1941 is against the decision of the District Judge that the appeal preferred to him from the trial Court's order was incompetent. The learned District Judge held that the appeal was incompetent on the ground that rule 9 which provides a right of appeal is *ultra vires*. This view cannot be now sustained. Rule 9 is within the powers of the local Government, but it does not follow that the appeal preferred to the learned District Judge was a competent appeal. Under rule 9 a right of appeal is given against an "order of the Court declaring the amount of the debt under rule 7". In the present case there was no order of the District Munsiff declaring the amount of the debt. The learned District Munsiff came to the conclusion that the

*C.R.Ps. Nos. 497 and 498 of 1941. 13th July, 1942.

debt which the petitioner sought to scale down was one falling within the purview of section 10 (2) (*ii*) and that it was therefore exempt from the operation of Act IV of 1938 and he dismissed the petition. Although the decision of the learned District Munsiff was a decision that the debt was immune from reduction under Act IV of 1938, there is no decision which can be deemed to be a declaration of the amount of the debt. We are therefore constrained to hold that no appeal lay to the learned District Judge, although we do not agree with the grounds upon which the learned Judge rejected the appeal. It follows that C.R.P. No. 497 of 1941 has to be dismissed.

C.R.P. No. 498 of 1941 is a petition to revise the order of the District Munsiff against which the abortive appeal was preferred. The essential facts are that the respondents sold 14 acres of land to one Ayyaswami for Rs. 6,000 on 7th November, 1918, and on the same day Ayyaswami mortgaged under Ex. A the same land to respondent for the sale price. In 1926 Ayyaswami sold the land which he had purchased in plots to different individuals. The petitioner's husband Muniswami purchased one plot under a sale-deed which directed him to pay Rs. 960 towards the discharge of the respondent's mortgage Ex. A. By a similar sale one Venkatarama Reddi purchased another plot, the sale-deed containing a similar direction to pay proportionately to the discharge of Ex. A. In 1927, this other vendee Venkatarama Reddi sold part of the land which he had purchased to the petitioner's husband Muniswami and the sale-deed again contained a direction to pay a proportionate sum out of the sale price towards the discharge of the respondent's mortgage Ex. A. It does not appear that there was any endorsement on the respondent's mortgage Ex. A made contemporaneously with any of these sale-deeds and there are no materials before us to indicate that the respondent agreed to release his vendee from his liability at this time. On the 1st day of May, 1927, Muniswami executed a mortgage Ex. I in favour of the respondent, the consideration for which was, made up of two amounts which Muniswami, had undertaken to pay under his two sale-deeds, one the sale-deed from Ayyaswami and the other the sale-deed from Ayyaswami's vendee, Venkatarama Reddi. The amount of this mortgage was Rs. 2,000 and on the date of the mortgage an endorsement of discharge to this extent was made on Ex. A the mortgage executed by Ayyaswami. Ex. A was finally discharged in 1935.

The question is whether the debt under the mortgage Ex. I for Rs. 2,000, dated 1st May, 1927, is a liability for which a charge is provided under S. 55 (*iv*) (*b*) of the Transfer of Property Act, so as to bring it within the protection of S. 10 (2) (*ii*) of Act IV of 1938. We have held in *Varadaraja Perumal Pillai* v. *Palanimuthu Goundan*[1] that when there was a debt, incurred originally for the balance of the purchase price of land, embodied in a promissory note which underwent a number of renewals, the debt due under the final renewal was a debt in respect of which the protec-

1. (1940) 2 M.L.J. 838.

Vijiyalakshmi Ammal v. Rangachariar.

Wadsworth, J.

tion of section 10 (2) (*ii*) of Act IV of 1938 can be invoked, even though the vendor's lien might no longer subsist at the time when the debt is enforced, the reason being that the exclusion of such liabilities from the operation of Act IV of 1938 depends not on the actual subsistence of the charge, but on the question whether in the beginning the liability was one in respect of which the Transfer of Property Act provided a charge. It seems to us that this decision governs the present case. When Ayyaswami sold his properties to Muniswami and to Venkatarama Reddi, the purchaser had notice of the subsistence of the lien and the same notice must be deemed to have been given to Muniswami when he later purchased a further plot from Venkatarama Reddi. There is nothing to show that the lien had been terminated by any act of the vendor; and when the ultimate purchaser consolidated his liabilities by the execution of the mortgage now in question (Ex. I), he was in fact renewing a liability in respect of which at its inception the vendor's lien existed. We hold therefore that the decision of the District Munsiff is correct and dismiss C.R.P. No. 498 of 1941.

The respondent will be entitled to his costs in C.R.P. No. 497 of 1941.

K.C. — *Petitions dismissed.*

[END OF VOLUME, 1942—II.]

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